United Nations

Report of the International Law Commission

Fifty-second session (1 May-9 June and 10 July-18 August 2000)

General Assembly
Official Records
Fifty-fifth session
Supplement No. 10 (A/55/10)

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission.*

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CHAPTER I

INTRODUCTION

1. The International Law Commission held the first part of its fifty-second session from 1 May to 9 June 2000 and the second part from 10 July to 18 August 2000 at its seat at the United Nations Office at Geneva.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain Al-Baharna (Bahrain)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique J.A. Candioti (Argentina)
Mr. James Richard Crawford (Australia)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Mr. Nabil Elaraby (Egypt)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Raul Ilustre Goco (Philippines)
Mr. Gerhard Hafner (Austria)
Mr. Qizhi He (China)
Mr. Mauricio Herdocia Sacasa (Nicaragua)
Mr. Kamil E. Idris (Sudan)
Mr. Jorge E. Illueca (Panama)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Igor Ivanovich Lukashuk (Russian Federation)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Djamchid Momtaz (Islamic Republic of Iran)
Mr. Didier Opertti-Badan (Uruguay)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Victor Rodríguez-Cedeño (Venezuela)

Mr. Robert Rosenstock (United States)

Mr. Bernardo Sepúlveda (Mexico)

Mr. Bruno Simma (Germany)

Mr. Peter Tomka (Slovakia)

Mr. Chusei Yamada (Japan)

3. At its 2612th meeting, on 1 May 2000, the Commission elected Mr. Kamil E. Idris (Sudan) and Mr. Djamchid Momtaz (Islamic Republic of Iran) to fill the two casual vacancies caused by the demise of Mr. Doudou Thiam and the election of Mr. Awn Al-Khasawneh to the International Court of Justice.

B. Officers and the Enlarged Bureau

4. At its 2612th meeting on 1 May 2000, the Commission elected the following officers:

Chairman:	Mr. Chusei Yamada
First Vice-Chairman:	Mr. Maurice Kamto
Second Vice-Chairman:	Mr. Peter Tomka
Chairman of the Drafting Committee:	Mr. Giorgio Gaja
Rapporteur:	Mr. Victor Rodríguez-Cedeño.

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

6. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. M. Kamto (Chairman), Mr. J.C. Baena Soares, Mr. C. Economides, Mr. Z. Galicki, Mr. R.I. Goco, Mr. G. Hafner, Mr. J.E. Illueca, Mr. J.L. Kateka, Mr. M. Kusuma-Atmadja, Mr. D. Momtaz, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. R. Rosenstock, Mr. B. Sepúlveda, and Mr. V. Rodríguez-Cedeño (ex officio).

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[1] Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. A. Pellet and Mr. P.S. Rao.

[2] Mr. J.R. Crawford, Mr. Ch.J. Dugard, Mr. A. Pellet, Mr. P.S. Rao and Mr. V. Rodríguez-Cedeño.

C. Drafting Committee

7. At its 2614th and 2632nd meetings on 3 May and 6 June 2000 respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) State responsibility: Mr. G. Gaja (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. E.A. Addo, Mr. I. Brownlie, Mr. E.J.A. Candioti, Mr. C.J.R. Dugard, Mr. C. Economides, Mr. Z. Galicki, Mr. R.I. Goco, Mr. G. Hafner, Mr. Q. He, Mr. P.C.R. Kabatsi, Mr. A. Pellet, Mr. R. Rosenstock and Mr. V. Rodríguez-Cedeño (ex officio).

(b) Reservations to treaties: Mr. G. Gaja (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. J.C. Baena Soares, Mr. I. Brownlie, Mr. C. Economides, Mr. N. Elaraby, Mr. M. Kamto, Mr. G. Pambou-Tchivounda, Mr. R. Rosenstock, Mr. B. Simma, Mr. P. Tomka and Mr. V. Rodriguez-Cedeño (ex officio).

8. The Drafting Committee held a total of 27 meetings on the two topics indicated above.

D. Working Groups

9. At its 2616th and 2628th meetings on 5 May and 26 May 2000 respectively, the Commission also established the following Working Groups composed of the members indicated:

(a) International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities): Mr. P.S. Rao (Chairman and Special Rapporteur), Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. G. Hafner, Mr. J.L. Kateka, Mr. I. Lukashuk, Mr. R. Rosenstock and Mr. V. Rodriguez-Cedeño (ex officio).

(b) Unilateral acts of States: Mr. V. Rodríguez-Cedeño (Chairman and Special Rapporteur), Mr. H. Al-Baharna, Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. P.C.R. Kabatsi, Mr. J.L. Kateka, Mr. D. Momtaz, Mr. G. Pambou-Tchivounda and Mr. B. Sepúlveda.

10. The Planning Group re-established on 2 May 2000 a Working Group on the Long-Term Programme of Work, which was composed of the following members: Mr. I. Brownlie (Chairman), Mr. Z. Galicki, Mr. R.I. Goco, Mr. Q. He, Mr. M. Herdocia Sacasa, Mr. D. Opertti-Badan, Mr. B. Sepúlveda, Mr. B. Simma and Mr. V. Rodríguez-Cedeño (ex officio). Contributing members: Mr. E.A. Addo, Mr. C. Economides, Mr. G. Hafner, Mr. A. Pellet, Mr. R. Rosenstock and Mr. C. Yamada. On 31 May 2000, the Planning Group

re-established a Working Group on Split Session composed as follows: Mr. R. Rosenstock (Chairman), Mr. J.C. Baena Soares, Mr. R.I. Goco, Mr. J.L. Kateka, Mr. G. Pambou-Tchivounda and Mr. C. Yamada.

E. Secretariat

11. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Manuel Rama-Montaldo, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Mr. George Korontzis, Ms. Virginia Morris, Mr. Renan Villacis, Legal Officers and Mr. Arnold Pronto, Associate Legal Officer, served as Assistant Secretaries to the Commission.

F. Agenda

12. At its 2612th meeting, on 1 May 2000, the Commission adopted an agenda for its fifty-second session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities).
4. Reservations to treaties.
5. Diplomatic protection.
6. Unilateral acts of States.
7. Programme, procedures and working methods of the Commission and its documentation.
8. Cooperation with other bodies.
9. Date and place of the fifty-third session.
10. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-SECOND SESSION

13. Concerning the topic "State Responsibility", the Commission considered the third report[3] of the Special Rapporteur containing his proposals for Part Two (legal consequences of an internationally wrongful act of a State), as well as for a new Part Two *bis* (the implementation of State responsibility) and Part Four (general provisions), of the draft articles. The Commission decided to refer the draft articles in chapters I (general principles), II (the forms of reparation) and III (serious breaches of obligations to the international community as a whole) of Part Two, chapters I (invocation of the responsibility of a State) and II (countermeasures) of Part Two *bis*, and Part Four to the Drafting Committee. The Commission took note of the report of the Drafting Committee (Chapter IV).

14. With regard to the topic "Diplomatic protection", the Commission considered the first report of the Special Rapporteur,[4] dealing with issues of definition and scope of topic, the nature and conditions under which diplomatic protection may be exercised, in particular the requirement of nationality and the modalities for diplomatic protection, addressed in articles 1 to 8. To follow up on the discussions and the suggestions made in the Plenary, the Commission referred articles 1, 3 and 6 to open-ended informal consultations chaired by the Special Rapporteur. Taking into account the report of informal consultations, the Commission referred draft articles 1, 3 and 5 to 8 to the Drafting Committee (Chapter V).

15. As regards the topic "Unilateral acts of States", the Commission examined the third report of the Special Rapporteur.[5] The Special Rapporteur proposed a new draft article 1 on definition of unilateral acts, the deletion of the previous draft article 1 on the scope of the draft articles, a new draft article 2 on the capacity of States to formulate unilateral acts, a new draft article 3 on persons authorized to formulate unilateral acts on behalf of the State and a new draft article 4 on subsequent confirmation of an act formulated by a person not authorized for that purpose. He also proposed the deletion of previous draft article 6 on expression of consent

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[3] A/CN.4/507 and Add.1, Add.1/Corr.1 and 2, and Add.2-4.

[4] A/CN.4/506 and Corr.1 and Add.1.

[5] A/CN.4/505.

and a new draft article 5 on the invalidity of unilateral acts. The Commission decided to refer new draft articles 1 to 4 to the Drafting Committee and new draft article 5 to the Working Group on Unilateral Acts of States (Chapter VI).

16. With respect to the topic "Reservations to treaties", the Commission considered the fifth report[6] of the Special Rapporteur concerning the alternatives to reservations and interpretative declarations and the formulation, modification and withdrawal of reservations and interpretative declarations. The Commission adopted five draft guidelines pertaining to reservations made under exclusionary clauses, unilateral statements made under an optional clause, unilateral statements providing for a choice between the provisions of a treaty and alternatives to reservations and interpretative declarations (Chapter VII).

17. With regard to the topic of "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)", the Commission established a Working Group to examine the comments and observations made by States on the draft articles on the sub-topic of prevention which had been adopted on first reading by the Commission in 1998. On the basis of the discussion in the Working Group, the Special Rapporteur presented his third report[7] containing a draft preamble and a revised set of draft articles on prevention, along with the recommendation that they be adopted as a framework convention. Furthermore, the third report addressed questions such as the scope of the topic, its relationship with liability, the relationship between an equitable balance of interests among States concerned and the duty of prevention, as well as the duality of the regimes of liability and State responsibility. The Commission considered the report and decided to refer the draft preamble and draft articles contained therein to the Drafting Committee (Chapter VIII).

18. The Commission also adopted the Report of the Planning Group dealing with the long-term programme of work which listed the following topics for inclusion in the long-term programme of work together with syllabuses describing their possible contents: (a) Responsibility of international organizations; (b) Effects of armed conflict on treaties; (c) Shared natural resources of States; (d) Expulsion of aliens; (e) Risks ensuing from fragmentation of international law (Chapter IX, section A (1)).

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[6] A/CN.4/508 and Add.1-4.

[7] A/CN.4/510.

19. The Commission continued traditional exchanges of information with the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe (Chapter IX, section C).

20. A training seminar was held with 24 participants of different nationalities (Chapter IX, section E).

21. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 23 April to 1 June and from 2 July to 10 August 2001.

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

22. In response to paragraph 13 of General Assembly resolution 54/111 of 9 December 1999, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. State responsibility

23. The Commission would appreciate receiving from Governments comments and observations on the entire text of the draft articles provisionally adopted by the Drafting Committee, in particular on any aspect which it may need to consider further with a view to its completion of the second reading in 2001.

B. Diplomatic protection

24. The Commission would appreciate receiving from Governments comments and observations in answer to the following questions:

(a) May a State exercise diplomatic protection on behalf of a national, who has acquired nationality by birth, descent or bona fide naturalization, when there is no effective link between the national and the State?

(b) Is a State that wishes to exercise diplomatic protection on behalf of a national obliged to prove that there is an effective link between the individual and that State?

(c) May a State exercise diplomatic protection on behalf of a national who has an effective link with that State when that national is also a national of another State, with which it has a weak link?

(d) Is it permissible for a State to protect a dual national against a third State of which the injured individual is not a national without proving an effective link between it and the individual?

(e) Should the State in which a stateless person has lawful and habitual residence be permitted to protect such a person against another State along the lines of diplomatic protection?

(f) Should the State in which a refugee has lawful and habitual residence be permitted to protect such a refugee along the lines of diplomatic protection?

C. Unilateral acts of States

25. The Commission would particularly welcome comments on points (a), (b) and (c) mentioned in paragraph 621 of the report.

D. Reservations to treaties

26. The Commission would welcome any comments and observations by Governments on the 14 draft guidelines included in the part of the fifth report of the Special Rapporteur (A/CN.4/508/Add.3 and 4) concerning formulation of reservations and interpretative declarations and on which the Commission decided to postpone the debate to the next session due to lack of time. Those draft guidelines are reproduced in notes 143, 145-150, 155, 158, 159, 161-162 and 164 below.

E. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

27. The Commission would like to draw attention to paragraphs 672-720 of the report and, in particular, to paragraph 721 containing the draft preamble and draft articles referred to the Drafting Committee. The Commission would welcome any comments that Governments may wish to make in that respect.

CHAPTER IV

STATE RESPONSIBILITY

A. Introduction

28. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed F.V. Garcia Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports dealing on the whole with the question of responsibility for injuries to the persons or property of aliens.[8]

29. The Commission, at its fourteenth session, in 1962 set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study.[9]

30. At its fifteenth session, in 1963, the Commission, having unanimously approved the report of the Subcommittee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

31. The Commission, from its twenty-first in 1969 to its thirty-first sessions in 1979, received eight reports from the Special Rapporteur.[10]

32. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic of "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would

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[8] *Yearbook ... 1969*, vol. II, p. 229.

[9] Ibid., p. 229 *et seq.*

[10] For the eight reports of the Special Rapporteur, see: *Yearbook ... 1969*, vol. II, doc. A/CN.4/217 and Add.1, pp. 125-156; *Yearbook ... 1970*, vol. II, doc. A/CN.4/233, pp. 177-198; *Yearbook ... 1971*, vol. II (Part One), doc. A/CN.4/246 and Adds.1-3, p. 199; *Yearbook ... 1972*, vol. II, doc. A/CN.4/264 and Add.1, p. 71; *Yearbook ... 1976*, vol. II (Part One), doc. A/CN.4/291 and Add.1 and 2, pp. 3-55; *Yearbook ... 1977*, vol. II (Part One), doc. A/CN.4/302 and Add.1-3; *Yearbook ... 1978*, vol. II (Part One), doc. A/CN.4/318 and Add.1-4 and *Yearbook ... 1980*, doc. A/CN.4/318/Add. 5-7.

concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility.[11]

33. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility".[12]

34. At its thirty-first session in 1979, the Commission, in view of the election of Mr. Ago as a judge of the International Court of Justice, appointed Mr. Willem Riphagen, Special Rapporteur for the topic. The Commission, from its thirty-second in 1980 to its thirty-eighth sessions in 1986, received seven reports from Mr. Willem Riphagen,[13] for Parts Two and Three of the topic.[14]

35. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of office as a member of the Commission had expired on 31 December 1986. The Commission, from its fortieth in 1988 to its forty-eighth in 1996 sessions, received eight reports from Mr. Arangio-Ruiz.[15]

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[11] *Yearbook ... 1975*, vol. II, pp. 55-59, doc. A/10010/Rev.1, paras. 38-51.

[12] *Yearbook ... 1980*, vol. II, (Part Two), pp. 26-63, doc. A/35/10, chap. III.

[13] For the seven reports of the Special Rapporteur, see:

Yearbook ... 1980, vol. II (Part One), p. 107, doc. A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, doc. A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, doc. A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, doc. A/CN.4/366 and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, doc. A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, doc. A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, doc. A/CN.4/397 and Add.1.

[14] At its thirty-fourth session (1983), the Commission referred draft articles 1 to 6 of Part Two to the Drafting Committee. At its thirty-seventh session (1985), the Commission decided to refer articles 7 to 16 of Part Two to the Drafting Committee. At its thirty-eighth session (1986), the Commission decided to refer draft articles 1 to 5 of Part Three and its annex to the Drafting Committee.

[15] For the eight reports of the Special Rapporteur, see *Yearbook ... 1986*, vol. II (Part One), p. 6, doc. A/CN.4/416 and Add.1; *Yearbook ... 1990*, vol. II (Part One), doc. A/CN.4/425 and Add.1; *Yearbook ... 1991*, vol. II (Part One), doc. A/CN.4/440 and Add.1; doc. A/CN.4/444 and Add.1-3; doc. A/CN.4/453 and Add.1 and Corr.1-3 and Add.2 and 3; doc. A/CN.4/461 and Add.1 and 2, doc. A/CN.4/469 and Corr.1 (English only) and Add.1 and 2 and A/CN.4/476

36. At the conclusion of its forty-seventh session, in 1995, the Commission had provisionally adopted, for inclusion in Part Two, draft articles 1 to 5[16] and articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 *bis* (Guarantees of non-repetition),[17] 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures).[18] It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action.[19] At its forty-seventh session, the Commission had also provisionally adopted, for inclusion in Part Three, article 1 (Negotiation), article 2 (Good offices and mediation), article 3 (Conciliation), article 4 (Task of the Conciliation Commission), article 5 (Arbitration), article 6 (Terms of reference of the Arbitral Tribunal), article 7 (Validity of an arbitral award) and Annex, article 1 (The Conciliation Commission) and article 2 (The Arbitral Tribunal).

37. At the forty-eighth session of the Commission, in 1996, Mr. Arangio-Ruiz announced his resignation as Special Rapporteur. The Commission completed the first reading of the draft articles of Parts Two and Three on State responsibility and decided, in accordance with

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and Corr.1 (English only) and Add.1. At its forty-first session (1989), the Commission referred to the Drafting Committee draft articles 6 and 7 of Chapter Two (legal consequences deriving from an international delict) of Part Two of the draft articles. At its forty-second session (1990), the Commission referred draft articles 8, 9 and 10 of Part Two to the Drafting Committee. At its forty-fourth session (1992), the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 *bis* for inclusion in Part Two of the draft articles. At its forty-fifth session (1993), the Commission referred to the Drafting Committee draft articles 1 to 6 of Part Three and the annex thereto. At its forty-seventh session (1995), the Commission referred to the Drafting Committee articles 15 to 20 of Part One dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles and new draft article 7 to be included in Part Three of the draft.

[16] For the text of articles 1 to 5 (para. 1), with commentaries, see *Yearbook ... 1985*, vol. II (Part Two), pp. 24 *et seq.*

[17] For the text of article 5, paragraph 2, and articles 6, 6 *bis*, 7, 8, 10 and 10 *bis* with commentaries, see *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/48/10), pp. 132 *et seq.*

[18] For the text of articles 11, 13 and 14, see ibid., *Forty-ninth Session, Supplement No. 10* (A/49/10), note 362. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (ibid., para. 352).

[19] Ibid., para. 352.

articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted by the Commission on first reading,[20] through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

38. At its forty-ninth session, in 1997, the Commission established a Working Group on State Responsibility to address matters dealing with the second reading of the topic.[21] The Commission also appointed Mr. James Crawford as Special Rapporteur.

39. The General Assembly, at its fifty-second session, recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the International Law Commission should continue its work on the topics in its current programme, including State responsibility, and recalled the importance for the Commission of having the views of Governments on the draft articles on State responsibility adopted on first reading by the Commission at its forty-eighth session, in 1996.

40. At its fiftieth session, in 1998, the Commission had before it the first report of Mr. Crawford, the Special Rapporteur. The report dealt with general issues relating to the draft, the distinction between "crimes" and "delictual responsibility", and articles 1 to 15 of Part One of the draft.[22] The Commission also had before it comments by Governments on the draft articles provisionally adopted by the Commission on first reading.[23] After having considered articles 1 to 15 *bis*, the Commission referred them to the Drafting Committee.

41. At the same session, the Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 7, 8, 8 *bis*, 9, 10, 15, 15 *bis* and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

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[20] Report of the Commission on the work of its forty-eighth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 125-151. For the text of article 42, paragraph 3, and articles 47, 48 and 51 to 53, with commentaries, see ibid., pp. 152 *et seq.*

[21] For the guidelines on the consideration of this topic on second reading adopted by the Commission on the recommendation of the Working Group, see ibid., paragraph 161.

[22] A/CN.4/490 and Add. 1-2 and Add.2/Rev.1 (French only), Add.2/Corr.1 (Arabic, Chinese, English, Russian and Spanish only), Add.3-4 and Add.4/Corr.1, and Add.5-6.

[23] A/CN.4/488 and Add.1-3.

42. At its fifty-first session, in 1999, the Commission had before it the second report of the Special Rapporteur, Mr. Crawford. That report continued the task, begun in 1998, of considering the draft articles in the light of comments by Governments and developments in State practice, judicial decisions and literature.[24] The Commission also had before it comments by Governments on the draft articles provisionally adopted by the Commission on first reading.[25] After having considered articles 16 to 19 (1), 20 to 26 *bis*, 27 to 28 *bis*, 29 *bis* and 29 *ter* (1), 30 to 33, 34 *bis* (1) and 35, the Commission referred them to the Drafting Committee.

43. At the same session, the Commission took note of the report of the Drafting Committee on articles 16, 18, 24, 25, 27, 27 *bis*, 28, 28 *bis*, 29, 29 *bis*, 29 *ter*, 31 to 33 and 35. The Commission also took note of the deletion of articles 17, 19 (1), 20 to 23,[26] 26 and 34.[27]

B. Consideration of the topic at the present session

44. At its present session, the Commission had before it comments and observations received from Governments on the draft articles provisionally adopted on first reading (A/CN.4/488 and Add.1-3 and A/CN.4/492) and the third report of the Special Rapporteur, Mr. James Crawford.[28] That report continued the task, begun in 1998, of considering the draft articles, particularly those contained in Part Two, in the light of the comments by Governments and developments in State practice, judicial decisions and literature. The Commission considered the report at its 2613th to 2616th, 2621st to 2623rd, 2634th to 2635th, 2636th to 2640th, 2644th to 2653rd meetings held from 2 to 5 May, 16 to 18 May, 8 to 9 June, 10 to 14 July, 21 July to 8 August 2000.

45. The Commission decided to refer the following draft articles to the Drafting Committee: 36, 36 *bis*, 37 *bis* and 38 at its 2616th meeting, on 5 May, 40 *bis* at its 2623rd meeting, on 18 May, 43 and 44 at its 2637th meeting, on 11 July, 45, 45 *bis* and 46 *bis*

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[24] A/CN.4/498 and Add.1-4.

[25] A/CN.4/488 and Add.1-3 and A/CN.4/492.

[26] Article 22, as adopted on first reading, dealt with exhaustion of local remedies. The Special Rapporteur proposed a new text for the provision as article 26 *bis*. The Drafting Committee decided to reserve discussion on the content of the article.

[27] The Drafting Committee adopted article 34 (Self-defence) as article 29 *ter*.

[28] A/CN.4/507 and Add.1, Add.1/Corr.1, Add.1/Corr.2 (French only), Add.2, Add.2/Corr.1-2, Add.3, Add.3/Corr.1, and Add.4.

at its 2640th meeting, on 14 July, 46 *ter*, 46 *quater*, 46 *quinquies*, and 46 *sexies* at its 2645th meeting, on 25 July, 30, 47, 47 *bis*, 48, 49, 50 and 50 *bis* at its 2649th meeting, on 1 August, 50A, 50B, 51, and the texts contained in footnotes 801 and 810 of A/CN.4/507/Add.4 at its 2653rd meeting, on 8 August.

46. At its 2662nd meeting, on 17 August, the Commission took note of the report of the Drafting Committee on the entire draft articles (A/CN.4/L.600*) which were provisionally adopted by the Drafting Committee, and which are reproduced in the Appendix to this Chapter.

1. Introduction by the Special Rapporteur of general issues relating to the draft articles

(a) Programme for completion of the second reading

47. As indicated in paragraphs 3 and 4 of the third report, the Special Rapporteur reaffirmed his commitment to completing the second reading of the draft articles in 2001. He recommended the following programme for achieving this ambitious yet feasible goal: the Drafting Committee should produce a complete text of the draft articles, leaving aside the question of dispute settlement, by the end of the present session; this would enable the Commission to consider and adopt the entire text and commentary, in the light of any further comments by Governments, at the next session.

(b) Outstanding issues relating to Part One

48. As identified in paragraphs 2 and 3 of the third report, there were four outstanding issues concerning Part One that could not be resolved until related aspects of Part Two had been decided: State responsibility for breach of obligations owed to the international community as a whole (art. 19), the formulation of articles on exhaustion of local remedies (art. 22) and countermeasures (art. 30), and the possible addition of an article on the exception of non-performance as a circumstance precluding wrongfulness. In addition, Part One contained material that was in several instances repeated in Part Two, e.g. in article 42, paragraph 4, which was unnecessary and raised doubts about the assumed applicability of the principles contained in the former part to the latter.

(c) General considerations relating to Part Two as adopted on first reading

(i) The scope of Part Two as compared to Part One

49. As a general point, the Special Rapporteur drew attention to a disjunction between Parts One and Two since the former was concerned with breaches of obligations by States and the latter, and especially article 40, was concerned with the responses of States to breaches of international law. The obligations covered in Part One might, for example, be obligations to an

international organization or to an individual - breaches whose invocation by persons other than States were not dealt with in Part Two. Accordingly, he was proposing a saving clause stating that Part Two was without prejudice to any rights arising from the commission of an internationally wrongful act by a State which accrued to any person or entity other than the State.

(ii) Title

50. The present title of Part Two was not readily comprehensible or self-explanatory and could be replaced by the more straightforward phrase "Legal consequences of an internationally wrongful act of a State", which conformed to the traditional view of State responsibility as a secondary legal consequence arising from a breach.

(iii) Formulation of the draft articles

51. As discussed in paragraph 7 (2) and (3) of the report, future drafting work should review the awkward formulation of the draft articles contained in Part Two in terms of categorical rights and the qualifying phrase "where appropriate", which had attracted the criticism of Governments from various legal traditions on the grounds that the articles were either too rigid or so vague as to lack content. However, in some cases qualifications such as "appropriate" may still be necessary in the absence of detailed specification of the content of a particular provision.

(d) Proposed revised structure of the remaining draft articles

52. As discussed in paragraphs 8 and 9 of the report, the Special Rapporteur proposed the revised structure set forth in paragraph 10 for the remaining substantive sections of the draft articles to disentangle issues relating to article 40 and to facilitate discussion.

53. Chapter I of Part Two should retain its existing title and should consist of at least three articles concerning general principles: article 36, a general introductory provision indicating that an internationally wrongful act entailed legal consequences; article 36 *bis*, dealing with cessation as a general principle; and article 37 *bis* on reparation as a general principle. Furthermore, the draft articles should contain a definition of "injured State", set out in article 40 *bis*, but it could be placed somewhere else in the text. It was uncertain whether article 38 was needed, but it had been included for the purposes of discussion.

54. Chapter II would deal with the three forms of reparation, namely restitution, compensation and satisfaction (without necessarily specifying the modalities of the choice between them, which could be done later), interest, and the consequences of the contributory fault of the injured State, and any other provisions that might be considered appropriate in the light of the debate.

55. The Special Rapporteur proposed inserting a new Part Two *bis* entitled "The implementation of State responsibility" to introduce a distinction between the legal consequences for the responsible State of an internationally wrongful act and the invocation of those consequences by the primary victim of the breach or, in certain circumstances, by other States, and to eliminate some of the confusion created by article 40. Part Two *bis* could contain articles dealing with the general question of who was entitled to invoke responsibility, currently dealt with in a highly unsatisfactory manner in article 40; the loss of the right to invoke responsibility, analogous to the loss of the right to invoke grounds for the termination or suspension of a treaty under the Vienna Convention on the Law of Treaties;[29] countermeasures as a form of invocation of responsibility, rather than of reparation, since they were taken against a State that refused to acknowledge its responsibility and cease its wrongful conduct; and the issues addressed in article 19 in terms of the invocation of a responsibility to the international community as a whole.

56. Noting the provisional decision not to link the taking of countermeasures to dispute settlement, the Special Rapporteur recommended that Part Three be considered in general terms after the adoption of the entire draft, taking into account their form. It would be pointless to include dispute settlement provisions unless the draft was submitted to the General Assembly as a convention. Furthermore, the acceptance of such provisions was questionable since the text covered literally the whole of the obligations of States.

57. The Special Rapporteur also recommended including Part Four on general provisions, to include, *inter alia*, the provision on *lex specialis*.

2. Summary of the debate on general issues

58. The Special Rapporteur was commended for his third report which enriched not only the work of the Commission, but also international law in general, by establishing the parameters and identifying the problems with respect to an extremely difficult subject.

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[29] United Nations *Treaty Series*, vol. 1155, p. 331.

(a) Programme for completion of the second reading

59. Support was expressed for the Special Rapporteur's proposed programme for the completion of the second reading of the draft. However, it was noted that the Commission had set aside for further reflection a number of questions relating to Part One, such as State responsibility for breaches of obligations *erga omnes* and the relationship between the provision in question and article 19 as adopted on first reading. It was also said that the draft articles of Part Two adopted on first reading in 1996 had not been considered with the same care as those of Part One. It was suggested that, in particular, the question of the violation of multilateral obligations should be the subject of an in-depth discussion. It was noted that the fifty-fifth session of the General Assembly would give the Commission a last opportunity to obtain feedback from the Sixth Committee on certain questions such as countermeasures and dispute settlement.

(b) The distinction between primary and secondary rules

60. Regarding paragraph 50 of the report, the view was expressed that the distinction between primary and secondary rules was not problematic since the function of a norm in a given context determined whether it was of a primary or secondary nature. In contrast, the view was expressed that the distinction between primary and secondary rules was intellectually tempting, but rather artificial, hard to maintain, difficult to apply in practice and sometimes invalid. It was, however, unnecessary to dwell unduly on the problem even if in certain cases the distinction was artificial, as a general matter it was workable and it had long been the plinth on which the entire drafting exercise rested. The Special Rapporteur agreed that the distinction between primary and secondary rules should not be abandoned, although the application of many secondary rules would be affected by primary rules, and this needed to be made clear as appropriate, especially in the commentary.

(c) The reflexive nature of the rules of State responsibility

61. Support was expressed for the characterization of the rules of State responsibility as reflected in paragraph 7 of the Special Rapporteur's report. However, it was also suggested that if the circumstances precluding wrongfulness, set out in Part One, were intended to apply to obligations in Part Two, it would be necessary to state this explicitly in the draft. Others thought

it would be preferable not to regulate this question and to leave it to customary international law. While recognizing the relationship between Parts One and Two, it was considered important to avoid premature conclusions based on the notion of reflexivity. Noting the uncertainty expressed about reflexivity, the Special Rapporteur suggested that it was a matter requiring further consideration in the Drafting Committee, which would have to decide on the retention or deletion of certain provisions.

(d) The scope of the draft articles

62. It was suggested that the draft articles be expanded to cover all cases of State responsibility, not only those between States, since in describing consequences of internationally wrongful acts, account would inevitably have to be taken of the position of all those who, under international law, had been injured, whether States, international organizations, other entities or individuals. The view was expressed that although the present wording of article 36, paragraph 1, covered all international obligations, the matter could be left to the primary obligation when it came to those other entities and to implementation procedures other than State responsibility such as reporting requirements and domestic legal forums; hence there was support for the proposed saving clause. It was further remarked that the articles were not supposed to codify the entire law of international responsibility, which was not sufficiently developed to warrant such treatment. The objective was to formulate general provisions that would provide the foundation for new branches in the law of international responsibility, with the details and nuances being worked out in future as practice in the field evolved.

(e) General considerations relating to Part Two

(i) The appropriate level of detail and specificity

63. According to one view, since the technical aspects of reparation had been neglected in Part Two, it was considered important to include, particularly in Chapter II, more specific and detailed articles on the forms and modalities of reparation, particularly compensation for *lucrum cessans*, and the means of calculating the amount and possible interest payments. These issues were not addressed in the draft and States needed to know when they had to make interest payments and required general guidelines for calculating them. In contrast, the view was expressed that, in terms of doctrine and in practice, the principles relating to remedies - compensation, restitution, remoteness of damage - were necessarily determined by primary rules

and the Commission must be careful not to formulate what appeared to be general rules when in fact it was only listing optional remedies. In other words it should avoid over-elaborating on the topic. It was suggested that the Commission must find a middle way between the two approaches to detailed rules on reparation bearing in mind that the more detailed the rules were, the less likely it was that reparations would fully comply with them and that some flexibility was required in the rules on reparation, particularly since State responsibility cases would usually be dealt with through negotiations, rather than by an international court or tribunal. The Special Rapporteur explained that the subject of detailed provisions had been dealt with in Part Two of his report in the context of compensation because that was where it most obviously arose. In view of the disagreement on the matter, he would seek guidance from the Commission on the advisability of going into details on the quantification of compensation or the calculation of interest; these issues were technical in character and varied from one context to another. He would propose a separate article on interest, since interest was different from compensation, but in his provisional view, both articles should be relatively general. It would be a matter for the Commission in due course to decide how much further detail it wanted.

(ii) Title

64. While agreeing with the Special Rapporteur on the need to reformulate the title of Part Two, some thought that the proposed new title was not fully satisfactory in terms of reflecting the content of the articles contained in Part Two and distinguishing it from Part Two *bis*. Suggestions for the title to Part Two included: "Reparation and obligation of performance", "Legal consequences of international responsibility", or to refer to "legal implications" rather than "consequences". However, the alternative title "Legal consequences of international responsibility" was described as inappropriate because responsibility was an immediate legal consequence of an internationally wrongful act, and it failed to resolve the problem of the relationship between Part Two and Part Two *bis*. The Special Rapporteur agreed that the title of Part Two covered some aspects which ought to be incorporated in Part Two *bis*. He was pleased about the apparent agreement on the need to draw a distinction between the consequences flowing from a wrongful act and their invocation. At a later stage, it would be necessary to consider whether the provisions in question should form two separate parts or two chapters of the same part.

(iii) Formulation of the draft articles

65. Strong support was expressed for the Special Rapporteur's proposal to reformulate the draft articles from the perspective of the State incurring responsibility rather than that of the injured State since this approach was consistent with Part One and facilitated solving difficult issues in Parts Two and Two *bis*.

(f) The structure of the draft articles

66. There was broad support for the new structure proposed by the Special Rapporteur in paragraph 10 of the report.

67. It was suggested that the rules on a plurality of States could be divided: the obligations of a plurality of author States could be dealt with in Chapter II (Legal consequences of an internationally wrongful act of a State) and the rights of a plurality of injured States could be addressed in Chapter II *bis* (The implementation of State responsibility). Alternatively, all the rules on plurality could be included in a separate chapter.

68. Support was expressed for the Special Rapporteur's proposal to include a Part Two *bis* and to move the provisions on countermeasures from Part Two to Part Two *bis* since countermeasures related to the implementation of responsibility, not the content or forms of international responsibility. It was suggested that, in accordance with Special Rapporteur Ago's original conception of Part Two *bis*, it should have contained articles on diplomatic protection, but they could not now be included since diplomatic protection was being treated as a separate topic. Nevertheless, the Special Rapporteur was urged to include a "without prejudice" clause on diplomatic protection in Chapter I of Part Two *bis*. In contrast, the view was expressed that the desirability of having a Part Two and a Part Two *bis* should be re-examined once the substantive articles had been considered.

69. There was support for the Special Rapporteur's proposal to set aside Part Three for the time being. The linkage between the form of the draft articles and the peaceful settlement of disputes was said to be clearly demonstrated in paragraph 6 of the report. The view was expressed that nothing would be more harmful than to make substantive rules on State responsibility depend on the highly hypothetical acceptance of compulsory dispute settlement procedures by States, as was the case with countermeasures in the first reading text. In contrast, the view was expressed that the only form the text could take was that of an international

convention, which would clearly call for a general, comprehensive system for the settlement of any disputes that might arise from the interpretation or application of the draft as a whole. If, however, the introduction of such a system were to prove difficult, it would be necessary to revert to the idea of setting up a dispute settlement procedure at least for disputes entailing countermeasures.

70. There was also support for the Special Rapporteur's proposal to include a Part Four dealing with general provisions. The Special Rapporteur was right to propose including a general part containing common "without prejudice" clauses, any definitions other than that of responsibility, and all provisions concerning more than one part of the draft. However, the view was also expressed that the content of a new Part Four required more detailed analysis.

3. Special Rapporteur's concluding remarks on the debate on general issues

71. As for the difficulty of establishing a distinction between primary and secondary rules, a problem several members had raised, he considered that the Commission had no choice but to adhere to its original decision and maintain that distinction.

72. He noted that there was general agreement on the strategy of formulating Part Two, or at least the consequences set forth therein, in terms of the obligations of the responsible State and on the need to deal with those obligations and their invocation by other States, if not in different parts, at least in different chapters, of one and the same part. It had also become apparent that the existing provisions, even if rearranged, would in substance be retained, together with some additional elements, such as an article on interest, which had been proposed by the previous Special Rapporteur, Mr. Arangio-Ruiz.

73. With regard to the possibility of entities other than States invoking the responsibility of a State, he stressed that the open conception of responsibility formulated in Part One allowed for that possibility. It was clear that the responsibility of the State to entities other than States was part of the field of State responsibility. It did not follow that the Commission must deal with those questions: there were a number of reasons, not related to the field of State responsibility, why it should not do so, though it needed to spell out the fact that it was not doing so in order to make clear the discrepancy between the content of Part One and that of the remaining parts. That was the purpose of the savings clause in paragraph 3 of proposed article 40 *bis*. It was not desirable to go beyond the current proposed scope.

4. Introduction by the Special Rapporteur of Part Two Legal consequences of an internationally wrongful act of a State

Chapter I General principles

(a) Introductory provision on the content of international responsibility (article 36)

74. The Special Rapporteur noted that no government had questioned the necessity of the introductory provision on the international responsibility of States contained in article 36, paragraph 1.[30]

(b) The general principle of cessation (article 36 *bis*)

75. The Special Rapporteur drew attention to two issues relating to the general principle of cessation, which was addressed in article 36, paragraph 2, and article 41. First, the obligation of cessation was the consequence of the breach of the primary obligation and did not exist if the primary obligation ceased to exist. For example, the issue of cessation would not arise where the material breach of a bilateral treaty was invoked as a ground for its termination. That important point needed to be made in the form of a saving clause. Second, notwithstanding the lack of criticism by States of cessation (art. 41), some authors argued that cessation was the consequence of the primary obligation, not a secondary consequence of a breach, and therefore did not belong in the draft. As explained in paragraph 50 of the report, the Special Rapporteur believed that the draft should address the notion of cessation because it arose only after and as a consequence of a breach; it was related to other secondary consequences of the breach, for example countermeasures; and it was the primary concern in most State responsibility cases as indicated by the importance for example of declarations aimed at the cessation of the wrongful act and restoration of the legal relationship impaired by the breach.

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[30] The text of article 36 proposed by the Special Rapporteur reads:

Article 36

Content of international responsibility

> The international responsibility of a State which arises from an internationally wrongful act in accordance with the provisions of Part One entails legal consequences as set out in this Part.

A/CN.4/507, p. 53. For the analysis of this article by the Special Rapporteur, see ibid., paras. 17-18.

76. The Special Rapporteur proposed addressing the general principle of cessation in a single revised article 36 *bis*[31] which took into account the fact that the question of cessation could arise only if the primary obligation continued in force and formulated the obligation by reference to the concept of the continuing wrongful act retained in Part One of the draft. In terms of its placement, the general principle of cessation should logically come before reparation since there would be cases in which a breach was drawn to the attention of the responsible State, which would immediately cease the conduct and the matter would go no further.

(c) Assurances and guarantees of non-repetition (article 36 *bis (continued)*)

77. The Special Rapporteur drew attention to the twofold consequences of an internationally wrongful act: the future-oriented consequences of cessation and assurances and guarantees against non-repetition, assuming that the obligation continued, and the past-oriented consequence of reparation, i.e. undoing the damage that the breach had caused. This coherent approach to the question suggested that assurances and guarantees should be addressed with cessation in a single article as two conditions for ensuring that the legal relationship impaired by the breach had been restored: first, the breach stopped, and second, if appropriate, there were guarantees that it would not be repeated. Noting that sufficient assurances and guarantees could range from extraordinarily rigorous arrangements to mere promises or undertakings in different

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[31] The text of article 36 *bis* proposed by the Special Rapporteur reads:

Article 36 *bis*

Cessation

1. The legal consequences of an internationally wrongful act under these articles do not affect the continued duty of the State concerned to perform the international obligation.

2. The State which has committed an internationally wrongful act is under an obligation:

(a) Where it is engaged in a continuing wrongful act, to cease that act forthwith;

(b) To offer appropriate assurance and guarantees of non-repetition.

A/CN.4/507, p. 53. For the analysis of this article by the Special Rapporteur, see ibid., paras. 44-52.

cases, the Special Rapporteur saw no alternative but to use the somewhat imprecise term "appropriate" and to incorporate the phrase "to offer appropriate assurances and guarantees of non-repetition" to provide the necessary degree of flexibility

(d) The general principle of reparation (article 37 *bis* and article 42, paras 3 and 4)

78 The Special Rapporteur drew attention to two problems with the existing draft First, the general principle of reparation was formulated throughout the draft articles as a right of the injured State and yet the concept of the injured State was introduced in the middle of the logical construct without any consequent reasoning, rather than at the beginning, as suggested by France, or at the end, as proposed by Special Rapporteur Ago In other words the draft articles switched in mid-stream between formulations in terms of the responsible State to formulations in terms of the injured State Second, the identification of the rights of an injured State implied that that injured State was the only State involved, which in effect "bilateralized" multilateral legal relations by attributing the rights singularly to individual States This produced an intolerable situation with respect to responsibility vis-à-vis several States or the international community as a whole The Special Rapporteur proposed addressing these problems by formulating the general principle of reparation as an obligation of the State committing the internationally wrongful act to make reparation, in an appropriate form, for the consequences of that act, and addressing the question of who could invoke the responsibility of that State and in what form either in a later section of Part Two or in Part Two *bis*

79 In addition, the Special Rapporteur drew attention to three problems that arose with regard to giving effect to the general principle of reparation already contained in the formulation of a right of an injured State in article 42, paragraph 1 First, the Special Rapporteur believed that a State was responsible for the direct or proximate consequences of its conduct notwithstanding the presence of concurrent causes and disagreed with the commentary to article 42 in this respect He proposed simple language in the draft article to achieve that end, bearing in mind that the problem of remote or indirect damage could only be resolved by the application of the particular rules to the particular facts and that different legal systems had different ways of addressing this problem Second, the Special Rapporteur noted that article 42, paragraph 3, had been strongly criticized by certain Governments The basic principle, as stated

in the *Chorzów Factory* case,[32] was that the responsible State should make reparation for the consequences of its wrongful act, and provided that there was some concept of "direct and not too remote" causation implied in that wording, there was no reason to fear that the requirement to do so would deprive that State of its own means of subsistence. The form that reparation might take, its timing and questions of modalities might well be affected by the position of the responsible State. Moreover, in extreme instances, as in the *Russian Indemnity* case,[33] a State might have to defer compensation until it was in a position to make such payments. But except for the fiasco of reparations payments at the end of the First World War, there was no history that called for a limit of the kind in question. For those reasons, he proposed deleting article 42, paragraph 3, and dealing with the problems raised in the context of the specific forms of reparation in Chapter II. Third, the Special Rapporteur proposed the deletion of article 42, paragraph 4, since this principle was already stated in article 4. He therefore proposed that the general principle of reparation set forth in article 37 *bis* be incorporated in Part Two, Chapter I.[34]

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[32] P.C.I.J., Series A, No. 9 (1927).

[33] UNRIAA, vol. XI, p. 431 (1912).

[34] The text of article 37 *bis* proposed by the Special Rapporteur reads:

Article 37 *bis*

Reparation

1. A State which has committed an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act.

2. Full reparation shall eliminate the consequences of the internationally wrongful act by way of restitution in kind, compensation and satisfaction, either singly or in combination, in accordance with the provisions of the following articles.

A/CN.4/507, p. 54. For the analysis of this article by the Special Rapporteur, see ibid., paras. 23-43.

(e) Other legal consequences under customary international law (article 38)

80 The Special Rapporteur doubted the need for article 38[35] for two reasons. First, the *lex specialis* principle provided that specific rules of treaty law or of customary international law governed the consequences in a specific case of a breach. Second, the Commission had not identified other general consequences of a breach under international law that were not set out in Part Two. The commentary identified two consequences of a wrongful act, but neither had any bearing on the subject of responsibility. If the Commission could pinpoint other consequences within the field of State responsibility, then it should try to indicate what they were. The only case for retaining article 38 was the general principle of law in the maxim *ex injuria ius non oritur*, which held that, when a State had committed a wrongful act, it could not rely on that act to extricate itself from a particular situation. The Court had cited that principle in the *Gabčikovo-Nagymaros*[36] case in drawing particular consequences within the framework of the termination of treaties rather than responsibility, but legal obligations might conceivably arise in specific contexts because of the generating effect of the principle *ex injuria ius non oritur*.

81 In terms of its placement, the Special Rapporteur believed that, if it was retained, article 38 should remain in Part Two because it was concerned with other consequences of a breach in contrast to the saving clauses in articles 37 and 39 which could be placed in a general Part Four.

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[35] The text of article 38 proposed by the Special Rapporteur reads:

Article 38

Other consequences of an internationally wrongful act

> The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

A/CN.4/507, p. 54. For the analysis of this article by the Special Rapporteur, see ibid., paras. 60-65.

[36] *Case concerning the Gabčikovo-Nagymaros Project, I.C.J. Reports, 1997*, p. 7.

5. Summary of the debate on Part Two

Chapter I. General principles

(a) Introductory provision on the content of international responsibility (article 36)

82. There was broad support for the proposed reformulation of article 36 which was described as correctly referring to international responsibility entailing legal consequences. However, the view was also expressed that the text of article 36 raised the same problem as the title of Part Two since Part Two *bis* also addressed the consequences of an internationally wrongful act. There was also some dissatisfaction with the title of article 36 which was said not to reflect the content of the provision itself. It was also proposed that in the French text, the words "*est engagée par un fait*" should be replaced by the words "*est engagée à raison d'un fait*", as the responsibility of a State could not arise from the act itself.

(b) The general principle of cessation (article 36 *bis*)

83. There was support for article 36 *bis* proposed by the Special Rapporteur, particularly for the reason stated in paragraph 50 of his report. There was also support for a single provision linking the related concepts of cessation and assurances and guarantees of non-repetition. However, the view was also expressed that those three concepts, although similar in some respects, were distinct and should be dealt with in separate articles.

84. It was suggested that the title of the proposed new article 36 *bis* should read "cessation and non-repetition" because cessation and assurances or guarantees of non-repetition were two different concepts. The title of article 36 *bis* was also considered dissatisfactory because it failed to refer to the continuing validity of the obligation breached.

85. As regards paragraph 1, it was considered important to reaffirm that the primary international obligation, although breached, continued to be in force and must be performed by the State in question.

86. Regarding paragraph 2 (a), it was suggested that it should emphasize the linkage to primary obligations rather than the continuation of the consequences of wrongfulness, along the lines of article 36 proposed by France found in paragraph 52 of the report. It was also suggested that the text should avoid any reference to "cessation of a continuing wrongful act" because, not only was the concept of a continuing wrongful act in itself difficult to pinpoint and use, but the obligation of cessation also applied when there was a series of instantaneous acts. The Special Rapporteur agreed that the notion was not exclusively linked to that of a continuing wrongful

act, since there could be a pattern of individual breaches which were not continuing breaches, but were a continuation of the pattern. This nonetheless called for cessation and, possibly, for assurances and guarantees of non-repetition.

(c) Assurances and guarantees of non-repetition (article 36 *bis (continued)*)

87. There was support for including a provision on the duty to provide assurances and guarantees of non-repetition in the draft because there were cases in which there was a real danger of a pattern of repetition and countries could not simply apologize each time. While recognizing that they would not be possible in every case, the view was expressed that it was necessary to provide for appropriate assurances and guarantees of non-repetition. For example, a guarantee of non-repetition would be particularly necessary in the case of a breach committed by recourse to force to reassure the victim of the breach. From a legal standpoint, the fact that such a guarantee had been given would be a new undertaking over and above the initial undertaking that had been breached. It was pointed out that such a guarantee could take a number of forms such as a declaration before the court, which might or might not be included in the court's ruling, or a diplomatic declaration, which would not necessarily be made during the proceedings. The report was considered to demonstrate a reasonable basis in State practice for including assurances and guarantees of non-repetition in article 36 *bis*. Attention was also drawn to certain measures contained in peace treaties signed after the Second World War and to the more recent WTO Panel's decision on Section 301 of the 1974 United States Trade Act.

88. Others questioned the necessity of retaining a provision on appropriate assurances and guarantees of non-repetition. While recognizing that in daily diplomatic practice Governments often provided such assurances, it was considered questionable whether that kind of statement given as a political or moral commitment could be regarded as a legal consequence of responsibility. It was therefore suggested that the provision had no legal significance and might be deleted. Some members were also of the opinion that little support existed in State practice for embodying the idea in a concrete legal formulation. It was remarked that there were no examples of cases in which the courts had given assurances and guarantees of non-repetition. The actual place of assurances and guarantees of non-repetition in the current practice of States was questioned since they seemed directly inherited from nineteenth-century diplomacy.

89. The Special Rapporteur said that in the nineteenth century there had been instances in which demands for ironclad guarantees and assurances had been made in coercive terms and enforced coercively. Nevertheless, there were modern examples of guarantees and assurances

supplied in the form of a declaration before a court and of demands therefor submitted without coercion. Moreover, as even critics of the notion admitted, assurances and guarantees were frequently given in State practice, for example, by the sending State to the receiving State concerning the security of diplomatic premises.

90. The view was expressed that in a situation where a domestic law obliged State organs to act in a way contrary to international law, it was the application of that law, not the law itself, that was a breach of international law. Assurances and guarantees of non-repetition could constitute a means of obliging a State to bring its conduct into conformity with international law, e.g. by repealing or amending the law in question. However, it was also noted that the adoption of a law could engage State responsibility, for instance, a law organizing genocide, or a law empowering the police to commit torture. The view was also expressed that assurances and guarantees of non-repetition were needed in cases in which the legislation of a State and its application led to grave violations which, although not continuing, were recurrent. The Special Rapporteur noted that this was a very delicate subject because it concerned the relationship between international and internal law. In general, the mere existence in internal law of provisions which might be capable in certain circumstances of producing a breach was not per se a breach of international law, since, *inter alia*, such a text could be implemented in a way consistent with international law.

91. Regarding the formulation of paragraph 2 (b), it was suggested that the appropriateness and applicability of assurances and guarantees of non-repetition varied greatly with the particular context and, therefore, the provision had to be worded in very flexible and general terms. Support was also expressed for recognizing the limited application of the provision by replacing "where appropriate" with "if circumstances so require", as proposed by the Czech Republic in the Sixth Committee. It was also suggested that assurances and guarantees of non-repetition should be a function of two parameters: the seriousness of the breach and the probability of repetition. The Special Rapporteur endorsed the position that it would be useful to clarify the notion of assurances and guarantees of non-repetition and to refer in the commentary to the question of the gravity of the breach and the risk of repetition.

(d) The general principle of reparation (article 37 *bis* and article 42, paras. 3 and 4)

92. Support was expressed for article 37 *bis* proposed by the Special Rapporteur.

93. It was suggested that the question of reparation was related to the intention underlying the wrongful act since a State committing the violation could not incur the same degree of

responsibility for a wrongful act that was intentional as for one that resulted from pure negligence. Support was expressed for taking account of the element of intention in article 37 *bis*.

94. Referring to paragraph 1, the view was expressed that it was not logical to speak in Part Two of the draft articles of the consequences of an internationally wrongful act; this consequence was the responsibility itself. Part Two dealt with consequences arising from responsibility. It was suggested that this paragraph be reformulated along the lines of "A State responsible for an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act". It was similarly suggested that this paragraph should read: "An internationally responsible State is under an obligation to make full reparation for the consequences of the internationally wrongful act that it has committed".

95. The view was expressed that the reference to "full reparation" in paragraph 1 was questionable for the following reasons: the goal was not full reparation, but as much reparation as possible to remedy the consequences of the wrongful act; full reparation was possible only in the case of straightforward commercial contracts where damages were quantifiable; the requirement to make reparation could be continuously modified by the circumstances of the case and by the failure of the affected party to take appropriate measures to mitigate damages, as was illustrated by the *Zafiro* case,[37] and the responsible State's ability to pay must be taken into account and a State must not be beggared. Responding to the notion that mitigation, if not performed, logically led to a decrease in the reparation, the view was expressed that, in fact, mitigation led to a decrease in the damage for which the reparation was paid. It was further stated that the fact that it was hard to quantify reparation in a given case did not mean that the rules were invalid. It was also considered unwise to abandon the concept of full reparation since it had not been criticized by Governments and the Commission should focus less on the situation of the wrongdoing State than on the injury suffered by a State as a result of the wrongful act of another State.

96. The words "flowing from that act" in article 37 *bis*, paragraph 1, were interpreted as an attempt to introduce the causal link between an act and damage or harm without actually

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[37] D. Earnshaw and others (Great Britain) v. United States, UNRIAA, vol. VI, p. 160.

mentioning damage or harm. However, the word "flowing" was considered somewhat unclear, and a preference was expressed for the wording "reparation for all the consequences of that wrongful act".

97. The view was expressed that the obligation of reparation did not extend to indirect or remote results flowing from a breach, as distinct from those flowing directly or immediately. It was further stated that the customary requirement of a sufficient causal link between conduct and harm should apply to compensation as well as to the principle of reparation. Similarly, the view was expressed that only direct or proximate consequences and not all consequences of an infringement should give rise to full reparation. With regard to the direct nature of the damage, the chain of causality, or "transitivity", must be direct and uninterrupted, whereas the cause might not be immediate. It was suggested that sooner or later the Commission would have to make a general study of causation. The Special Rapporteur noted that the application of the concept of "remote damage" depended on the particular legal context and on the facts themselves. He also noted agreement on the need to reflect on the topic of directness or proximity in the context of article 37 *bis*.

98. As regards paragraph 2, there were different views as to whether a priority should be established with respect to the forms of reparation set forth therein. Some members expressed concern that the draft placed restitution in kind on the same level as other forms of reparation, namely, compensation and satisfaction. Attention was drawn to the *Chorzów Factory* case giving priority to restitution as the best means of reparation in that it restored as far as possible the situation that had existed before the breach. In contrast, the view was expressed that restitution was not a general consequence of a wrongful act but rather an optional remedy whose applicability depended on the primary rules, i.e. the precise legal context, which would determine whether compensation or restitution was the appropriate remedy. The Special Rapporteur noted that article 37 *bis* was neutral on the choice between restitution and compensation, whereas article 43, as it stood, established restitution as the primary remedy. He would return to that question when dealing with article 43.

99. As to paragraph 2, a concern was raised that although full reparation might eliminate the legal consequences of the internationally wrongful act, its material or factual consequences might persist, as reparation did not in every case seek to eliminate the consequences of the act, but was sometimes intended to compensate for them. It was therefore suggested that the words "eliminate the consequences" be amended. However, the proposal to replace "eliminate" by a

different expression was considered unsatisfactory since it was a question of eliminating the consequences of the wrongful act and not the act itself, which clearly could not be undone, and the new formula would no longer convey the original meaning.

100. There were different views as to whether article 42, paragraph 3, which stipulated that reparation must not result in depriving the population of a State of its own means of subsistence, should be retained with respect to reparation in article 37 *bis*. Some members favoured retaining this provision as of critical importance for developing countries. It was noted that article 37 *bis* did not include the provision of article 42, paragraph 3, which Governments had objected to since it could be abused by States to avoid their legal obligations and erode the principle of full reparation. At the same time, it was felt that the provision had its validity in international law, with attention being drawn to the influence of the case of the war reparations demanded from Germany after the First World War on the 1951 peace treaty between Japan and the Allied Powers. Attention was also drawn to national legislation concerning measures of constraint which exempted from attachment items that were required for livelihood. It was suggested that the matter could be solved by resorting to circumstances precluding wrongfulness, as suggested in paragraph 41 of the report. It was also noted that the 1955 Austrian State Treaty contained a similar provision on protection of the means of survival. The question was raised as to whether the case cited concerning Japan could be covered by article 33 on state of necessity. However, article 33 was described as insufficient because it dealt with the problem of precluding the wrongfulness of the act, whereas article 42, paragraph 3, was addressing not wrongfulness, but the humanitarian aspect associated with forgiveness of debt and the re-establishment of peace after conflict. It was suggested that the provision could not be applied to reparation in full, but might apply to compensation. It was also suggested that the issue should be reconsidered in connection with countermeasures.

101. The Special Rapporteur did not think that the provision was covered by either necessity or distress which were grounds for postponing the payment of compensation rather than grounds for annulling obligations. What had happened in the 1951 treaty with Japan was that the Allied Powers, for a variety of reasons, including the realization that terrible mistakes had been made at the end of the First World War, had decided not to insist on reparations at all. In a sense, it had been an act of generosity, which had since been repaid a thousandfold. But it was also an indication that there was no point in insisting on reparation if it simply beggared the State which had to pay it. Such extreme situations posed a problem that was not addressed by circumstances

precluding wrongfulness. The problem facing the Commission was that the wording in article 42, paragraph 3, which had been taken from human rights treaties, was there to express that concern in extreme cases. On the other hand, it had been criticized by a number of Governments from various parts of the world as being open to abuse. The Commission accepted, especially in the context of countermeasures but even in that of the size of the reparation, that problems could arise and could not all be covered by a requirement of directness. The Drafting Committee would need to consider whether there was some way of reflecting that concern. The Special Rapporteur also agreed that the Commission should review the limitation referred to in article 42, paragraph 3, when it studied countermeasures.

102. Regarding article 42, paragraph 4, this provision was described as redundant because of article 4, paragraph 1. In contrast, the view was expressed that article 4 did not cover the cases referred to in article 42, paragraph 4, and it would therefore be wise to keep the latter provision or broaden the scope of article 4.

(e) Other legal consequences under customary international law (article 38)

103. Some members believed that article 38 should be retained. It was suggested that the scope should not be limited to the rules of customary international law since rules from other sources might also be relevant. However, other members agreed with the Special Rapporteur that article 38 added nothing of substance and could therefore be deleted.

104. There were a number of suggestions concerning this provision. It was suggested that the title might be improved by replacing "*conséquences diverses*" with "*autres conséquences*" because even the consequences referred to previously were included in "*conséquences diverses*". It was also suggested that the provision might be recast in positive terms, indicating by way of example some of the legal consequences that had not been dealt with, rather than attempting to cover all the consequences provided for by customary law and including a saving clause to cover anything that might have been overlooked. In addition, there were suggestions that such a saving clause could be modelled on article 73 of the Vienna Convention on the Law of Treaties or that this article could be referred to in the commentary. It was further suggested that a reference could be made in Part Four or in some part dealing with the rules of law relating specifically to the consequences of the wrongful act (*lex specialis*) to those consequences that were not part of the law of State responsibility, such as the right to terminate a treaty that had been materially

breached or the case of a State occupying a territory by force not being entitled to prerogatives implied by possession of a territory. In addition, it was also suggested that the contents of articles 38 and 37 (*lex specialis*) should be combined in one provision.

105. Some members questioned the placement of article 38 in Part Two which limited its application. There were a number of suggestions on this point as well, including: referring in article 38 to Parts One and Two; including it in the part on general provisions to indicate its applicability to the draft as a whole; or including it in the preamble as in other conventions. There were different views regarding the suggestion to include the provision in a preamble with concerns being raised that the draft articles might not take the form of a convention and that such a provision could raise questions concerning the articles.

106. The Special Rapporteur said that there seemed to be general support for the retention of article 38 in some form. It would be a matter for the Drafting Committee to decide whether it was placed in Part Two or in Part Four.

6. Special Rapporteurs concluding remarks on Chapter I

107. In summing up the debate on articles 36, 36 *bis*, 37 *bis* and 38, the Special Rapporteur noted that the Commission had made good progress on many issues, although there were still a number of outstanding questions on which a final decision would be taken during the consideration of other aspects of the report.

108. Turning to the various articles he had proposed, he noted that there had been a helpful debate on the language of the title of Part Two and also on the titles of the various articles. It was now for the Drafting Committee to consider all the proposals that had been made as to the form. There seemed to be general agreement that the four articles should be referred to the Drafting Committee and that they should be retained somewhere in the draft. In that connection, he had been persuaded of the need to retain article 38, either in Part Four or in the preamble, in the light of the proposals to be made by the Drafting Committee.

109. Similarly, there was general agreement that articles 36 *bis* and 37 *bis* should contain general statements of principle on cessation and reparation, respectively, so as to establish a balance in Chapter I. Useful comments had been made as to the form, including emphasis with regard to article 36 *bis*, that the question of cessation and particularly that of assurances and guarantees of non-repetition arose not only in the context of continued wrongful acts, but also in

the context of a series of acts apprehended as likely to continue, even though each of them could be viewed individually. It would be for the Drafting Committee to decide whether the reference to continuing wrongful acts in paragraph 2 (a) was necessary.

110. As paragraph 2 (b) concerned assurances and guarantees of non-repetition, the present title of the article, "Cessation", should perhaps be amended. Different views had been expressed on the retention of that subparagraph; however, it was clear from the debate that most members of the Commission favoured its retention. It should be borne in mind that no Government had proposed the deletion of article 46, "Assurances and guarantees of non-repetition", as adopted on first reading, although there had been proposals that it should be relocated. Replying to comments that there appeared to be no examples of guarantees of non-repetition ordered by the courts, he said it was true that there were very few such examples, on the other hand they were common in diplomatic practice. He noted, however, that the award made in the *Rainbow Warrior* case[38] included certain elements that might be conceived of as falling within the category of assurances and guarantees of non-repetition. As noted previously, the draft articles operated primarily in the area of relations between States, although it was the courts that might eventually have to apply them if the problem could not be resolved diplomatically. It was certainly true that assurances and guarantees of non-repetition were frequently given by Governments in response to breaches of an obligation, and not only continuing breaches. The Drafting Committee might wish to reformulate the subparagraph, incorporating the proposal by the Czech Republic referred to in paragraph 56 of the third report, perhaps mentioning the gravity of the wrongful conduct and the likelihood of its repetition and drawing on the corresponding article adopted on first reading.

111. Article 37 *bis* had raised several difficulties, particularly with regard to the expression "full reparation". The retention of the phrase had been questioned. As it had appeared in the original text of the article and had not been criticized to any significant extent by Governments, it would be preferable to retain it. It must, however, be borne in mind that there was a problem of balance. In questioning the retention of the provision, the remarks had focused almost entirely on the concerns of the responsible State, but, as had been pointed out, the Commission must also consider the concerns of the State that was the victim of the internationally wrongful act. It was

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[38] UNRIAA, vol. XX, p. 217 (30 April 1990).

true that there were extreme cases in which the responsible State could be beggared by the requirement of full reparation. Safeguard measures might thus be needed to cope with that situation, without prejudice to the principle of full reparation. As to the words "eliminate the consequences", which appeared in article 37 *bis*, paragraph 2, it had rightly been pointed out that it was impossible completely to eliminate the consequences of an internationally wrongful act. Furthermore, in its judgement in the *Chorzów Factory* case, the Permanent Court of International Justice had indicated that reparation should eliminate the consequences of the wrongful act "so far as possible". It might be a question for the Drafting Committee to consider whether the phrase "full reparation" should be included as such or whether the question should be dealt with in the commentary.

112. There had been general agreement that a notion of causation was implied in the concept of reparation and ought consequently to be expressed. There again, it would be for the Drafting Committee to decide whether the notion was correctly formulated in paragraph 1 of article 37 *bis*.

113. There was a fairly strong consensus in favour of the retention of article 38, but some difference of opinion as to its precise location in the text. The Drafting Committee might consider whether it should be incorporated in the proposed Part Four.

7. Introduction by the Special Rapporteur of the right of a State to invoke the responsibility of another State (article 40 *bis*)

114. The Special Rapporteur noted that article 40 was problematic in a number of respects. In the case of several injured States, it failed to recognize the right of every such State to demand cessation, and to distinguish between rights concerning cessation and reparation with respect to such States, which might be very differently affected by the breach, materially or otherwise. Its drafting identified examples rather than concepts, leading to confusion and overlap. In particular in the field of multilateral obligations, it dealt with a whole series of concepts without distinguishing them, notably paragraph 2 (e) and (f) and paragraph 3, or indicating their interrelationship. He noted that the provisions of paragraph 3 were redundant in the context of article 40, because in the event of an international crime, as defined, other paragraphs of article 40 would have already been satisfied. Aspects of the problem currently addressed by articles 19 and 51 to 53 would need to be resolved in later provisions.

115 The Special Rapporteur identified two possible approaches to article 40, either to provide a simple definition which in effect referred to the primary rules or the general operation of international law to resolve issues relating to the identification of persons (this would be a rather extreme but defensible version of the distinction between primary and secondary rules), or to specify more precisely how responsibility worked in the context of injuries to a plurality of States or to the international community as a whole. He proposed the first approach for bilateral obligations, by simply stating in a single provision that, for the purposes of the draft articles, a State was injured by an internationally wrongful act of another State if the obligation breached was owed to it individually. The elaborate provisions in article 40, paragraph 2 (a), (b), (c) and (d) would be unnecessary since international law would say when bilateral obligations existed. In contrast, he proposed a more refined and articulated solution for multilateral obligations, where the real problem was not so much obligations towards several States, but a single obligation vis-à-vis a group of States, all States or the international community as a whole.

116 The Special Rapporteur noted the relatively recent development of categories obligations that were in some sense owed to a group of States and the breach of which resulted in not merely bilateral consequences, referring *inter alia* to the *Barcelona Traction* case.[39] He suggested that there was authority for adopting three distinct categories of multilateral obligations: first a single obligation owed to the international community as a whole, *erga omnes*; second, obligations owed to all the parties to a particular regime, *erga omnes partes*, and third, obligations owed to some or many States, where particular States were nonetheless recognized as having a legal interest. The Special Rapporteur emphasized the need to distinguish between different States affected in different ways by a breach in the field of State responsibility, as discussed in paragraphs 108 *et seq.* of his Third Report. He also drew attention to the question of which responses by "injured States" might be permissible: this was addressed in Table 2 in paragraph 116.

117 As to the reformulation of article 40, the Commission should draw on article 60 of the Vienna Convention on the Law of Treaties which distinguished between cases where a particular State party was specially affected by a breach and those where the material breach of "integral

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[39] *I.C.J. Reports*, 1970, p. 3.

obligations" by one party radically changed the position of every party with respect to performance. A second aspect of the formulation of article 40 concerned the situation where all of the States parties to an obligation were recognized as having a legal interest. The Special Rapporteur saw no reason for requiring an express stipulation to that effect, nor for limiting it to multilateral treaties, as in article 40 adopted on first reading.

118. The Special Rapporteur proposed article 40 *bis*[40] and suggested that it would be logical to include this provision in a new part concerning the invocation of responsibility.

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[40] The text of article 40 *bis* proposed by the Special Rapporteur reads:

Article 40 *bis*

Right of a State to invoke the responsibility of another State

1. For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if:

(a) the obligation breached is owed to it individually, or

(b) the obligation in question is owed to the international community as a whole (*erga omnes*), or to a group of States of which it is one, and the breach of the obligation:

(i) specifically affects that State, or

(ii) necessarily affects the enjoyment of its rights or the performance of its obligations.

2. In addition, for the purposes of these draft articles, a State has a legal interest in the performance of an international obligation to which it is a party if:

(a) the obligation is owed to the international community as a whole (*erga omnes*);

(b) the obligation is established for the protection of the collective interests of a group of States, including that State.

3. This article is without prejudice to any rights, arising from the commission of an internationally wrongful act by a State, which accrue directly to any person or entity other than a State.

A/CN.4/507, pp. 54-55. For the analysis of this article by the Special Rapporteur, see ibid., paras. 66-118.

8. Summary of the debate on the right of a State to invoke the responsibility of another State (article 40 *bis*)

(a) General remarks

119. There was broad agreement that article 40, as adopted on first reading, was defective in a number of respects, as noted by the Special Rapporteur in paragraph 96 of his report and as shown in the topical summary of the Sixth Committee debate on that article (A/CN.4/504).

120. Several members welcomed the Special Rapporteur's proposal for article 40 *bis* as a major improvement in several respects, including the following: the distinction between the different types of obligations for the purpose of identifying the injured State and the recognition of a greater diversity of international obligations, notably obligations *erga omnes*; the distinction between injured States and States with a legal interest in the performance of an obligation; and the emphasis on the right of a State to invoke the responsibility of another State, focusing on the problems of States' entitlement to invoke responsibility in respect of multilateral obligations and on the extent to which differently affected States might invoke the legal consequences of a State's responsibility. At the same time, a number of members were of the view that various aspects of the proposal needed to be further clarified or developed, as indicated below.

(i) Definition of an injured State

121. The view was expressed that the draft articles should include a definition of the injured State. It was remarked that Governments had mentioned the importance of such a provision which would help to strike an appropriate balance between the concepts of "injured State", "wrongdoing State" and State with a "legal interest". However, the view was also expressed that drafting a comprehensive definition of the "injured State" raised major difficulties because the subject matter was extremely technical and complex and could not simply be based on customary law. An inclusive definition should thus be preferred, although one which followed the general line proposed by the Special Rapporteur rather than that adopted on first reading.

(ii) Obligations *erga omnes*

122. The view was expressed that the category of obligations *erga omnes* should be reserved for fundamental human rights deriving from general international law and not just from a particular treaty regime, in accordance with the *Barcelona Traction* case. However, the view was also expressed that obligations *erga omnes* could not necessarily be equated with fundamental obligations, peremptory norms or *jus cogens*. In addition, some members expressed concern about any attempt to draw a distinction between fundamental human rights and other human rights: any distinction would be difficult to apply in practice and would go against the

current trend towards a unified approach to human rights. It was suggested that in order to define the concept of injured State in respect of human rights, a quantitative criterion might be added, as opposed to the qualitative criterion used to distinguish between fundamental and other rights, so as not to call the unity of human rights into question. It was also suggested that a distinction must be made between obligations owed individually to all States making up the international community and those owed to that community as a whole.

123. The Special Rapporteur agreed on the need to be careful not to assert that all human rights were necessarily obligations *erga omnes*, and cited the example of human rights under regional agreements and even some provisions in the "universal" human rights treaties.

(iii) The reference to the international community

124. The reference to the international community in paragraphs 1 and 2 of article 40 *bis* gave rise to various comments and questions. A question was raised concerning the meaning of the term "international community as a whole" and whether it included individuals and non-governmental organizations. It was hoped that the Commission would refrain from including private entities such as non-governmental organizations among the subjects of law legally entitled to invoke State responsibility. The view was expressed that "international community as a whole" meant the international community of States as referred to in article 53 of the Vienna Convention on the Law of Treaties. Other members considered that the "international community as a whole" was a wider concept.

125. It was suggested that the difficulties the Commission was encountering were partly explained by the fact that it was discussing the international community and the obligations owed to it, while ignoring the existing institutions of the international community as such in the draft. Consequently, the Commission should consider including a provision entitled "Responsibility of the State in respect of the international community", the text of which would read: "In the case of a breach of an obligation *erga omnes* the State bears responsibility towards the international community of States represented by the universal international organs and organizations."

126. It was also considered difficult to see how the rules of State responsibility could be applied in practice, given such a loose and theoretical characterization of the affected group. It was also seriously doubted that the international community had become a subject of international law with the right to invoke the responsibility of a State which had breached its international obligations.

127 The Special Rapporteur noted that the concept of "obligations owed to the international community as a whole" had been introduced by the International Court of Justice. It was true that the concept was still developing, but it was widely accepted in the literature and could hardly be dispensed with. Moreover, in Parts Two and Two *bis*, the Commission was not concerned with the invocation of responsibility by entities other than States, and the draft articles should make that clear. But in fact it was the case that victims of human rights abuses had certain procedures available to them for what could only be described as the invocation of responsibility, and in some circumstances others could act on their behalf. A saving clause acknowledging that possibility should be inserted, and the matter left to developments under the relevant instruments.

(iv) The question of article 19

128 Several members expressed the view that the Commission would eventually need to consider the issues addressed in article 40 *bis* in relation to State "crimes". It was suggested that international crimes should constitute a separate category under this article. It was also suggested that paragraph 1 (b) should specify that an internationally wrongful act by a State could injure "all States if the obligation breached is essential for the protection of fundamental interests of the international community", this could be based on the definition contained in article 19 of the draft articles adopted on first reading, perhaps with some refinement. It was further suggested that all States should be entitled to invoke responsibility in respect of all its consequences, except perhaps that of compensation in cases of such serious breaches. Of particular importance was the principle of restitution in the form of a return to the *status quo ante*. The obligations provided for in article 53 as adopted on first reading would become far more comprehensible if the concept of "injured State" was applied to all States of the international community in cases of crime. Others, however, pointed out that to allow individual States to respond separately and in different ways to a "crime" was a recipe for anarchy, and that in such cases only collective responses were appropriate. Some members were of the view that in addressing this question it was not necessary or desirable to use the term "crime" or any other qualitative distinction among wrongful acts.

(v) The structure of article 40 *bis*

129 In terms of the structure of article 40 *bis*, there were various suggestions for dividing the provision into several separate articles in the interest of clarity. In particular, it was suggested that dividing it into two articles, one focusing on the State injured by an internationally wrongful

act of another State and the other on the State which had a legal interest in the performance of an international obligation without having been directly injured, would make it possible to formulate more clearly the conditions for, and the extent of, the right of a State to invoke the responsibility of another State

130 It was also suggested that article 40 *bis* should be divided according to the type of obligation with the first part dealing with bilateral or multilateral obligations which, in a specific context, gave rise to bilateral relations, and the second part dealing with obligations *erga omnes* and saying that, in the event of the infringement of those obligations, all States were entitled to request cessation and seek assurances and guarantees of non-repetition It was further suggested that the Commission should consider whether those States might request reparation, with the proviso that compensation was to be given to the ultimate beneficiary, which might be another State, an individual or even the international community as a whole It was noted that the Commission did not have to determine the beneficiary since that was a matter for the primary rules

(vi) The placement of article 40 *bis*

131 There were different views concerning the placement of article 40 *bis* including the following it should appear in Chapter I of Part Two to identify the categories of States to which obligations arising from a wrongful act were owed, it should be placed in Chapter I of Part Two if the Commission intended to specify the secondary obligations without referring to the concept of "injured State", it should be placed in the chapter on general principles if it differentiated between two groups of injured States, or it should appear at the beginning of Part Two *bis*, concerning the implementation of State responsibility, if its role was to determine which States had the right to invoke the responsibility of a State that had allegedly committed an internationally wrongful act

(b) Title of article 40 *bis*

132 Some members expressed the view that the title of article 40 *bis* did not fully correspond to its content Moreover there was no logical link between the first two paragraphs, which dealt successively with the definition of the injured State and conditions in which a State has a legal interest in the performance of an international obligation The proposed title of article 40 *bis* should be retained but its content should be revised accordingly

(c) Paragraph 1

133. There were various proposals concerning this paragraph. It was suggested that paragraph 1 should be amended to clarify the distinction between injured States and States having a legal interest without being directly injured to enable the article to play its role in determining who could trigger the consequences of responsibility. It was also suggested that the concepts of the injured State and the State having a legal interest should be defined before the question of the implementation of international responsibility was discussed and that the proposed list of cases in which a State suffered an injury should be open-ended, since it could be difficult to envisage all cases in which a State could be injured by an internationally wrongful act attributable to another State.

134. There were different views concerning the inclusion of the notion of damage or injury in article 40 *bis*, paragraph 1 or elsewhere in the draft. The view was expressed that it was unnecessary to include damage; its exclusion as an element of the wrongful act did not lead to the result that all States could invoke the responsibility of the responsible State. On the contrary only the State whose subjective right had been injured or in respect of which an obligation had been breached could demand reparation. The view was also expressed that injury or damage should not be included as a constituent element of an internationally wrongful act or in article 40 *bis*, which triggered the invocation of State responsibility, because the concept would have to be broadened to a degree that rendered it meaningless, and it was virtually impossible to "calibrate" it according to the proximity of a State to a breach.

135. In contrast, some members considered it necessary to have a provision equivalent to article 3 of Part One, which might read along the lines of "An internationally wrongful act incurs an obligation to make reparation when (a) that internationally wrongful act has caused injury; (b) to another subject of international law". The concept of damage was also considered indispensable by some members if the essential distinction was to be drawn between a State suffering direct injury on the basis of which it could invoke article 37 *bis*, and one that, in the framework of *erga omnes* obligations or as a member of the international community, merely had a legal interest in cessation of the internationally wrongful act. There were suggestions that it would be preferable to refer to injury or damage only in connection with reparation (since reparation presupposed damage), as compared with the issue of entitlement to act, e.g. by demanding cessation. It was also suggested that it would be useful to define the concept of damage, preferably in the draft articles.

136. The Special Rapporteur said that the proposal that a provision on damage should be drafted as a counterpart to article 3 of Part One deserved careful study. That concept had to be dealt with in Part Two of the draft articles in a variety of contexts, for example, compensation, to which it was unquestionably related. In terms of a definition of damage, it was first what was suffered by a State party to a bilateral obligation which was breached, secondly, what was suffered by the State specially affected, and, thirdly, what was suffered by the State affected just by virtue of the fact that it was a party to an integral obligation, breach of which was calculated to affect all States.

(i) Paragraph 1 (a)

137. The view was expressed that the treatment of bilateral obligations was a relatively simple matter, and seemed to be adequately reflected in paragraph 1 (a) of article 40 *bis*.

(ii) Paragraph 1 (b)

138. The view was expressed that the provision should be further clarified with respect to the three categories of multilateral obligations referred to in Table 1 of the report, namely obligations to the international community as a whole (*erga omnes*), obligations owed to all the parties to a particular regime (*erga omnes partes*), and the obligations to which some or many States were parties, but in respect of which particular States or groups of States were recognized as having a legal interest.

139. It was suggested that paragraph 1 (b) could be deleted altogether, since all the cases it envisaged had to do with obligations owed to States individually as well as to the international community as a whole, and were therefore covered by paragraph 1 (a). Under paragraph 1 (b) (i), an obligation *erga omnes* the breach of which specially affected one State was an obligation also owed to that State individually. An obligation *erga omnes* could be broken down into obligations owed by one State to other States individually. The same was true for paragraph 1 (b) (ii): an obligation *erga omnes* whose non-performance necessarily affected a State's enjoyment of its rights or performance of its obligations was, at the same time, owed to the State individually. On the other hand it was pointed out that even with respect to a breach of an obligation *erga omnes*, an individual State could be injured (e.g. the victim of an unlawful armed attack).

(d) Paragraph 2

140. The view was expressed that paragraph 2 met the need for a reference to States which had a legal interest. Such States, although not directly affected, could at least call for cessation

of a breach by another State. In agreeing with the Special Rapporteur's approach, attention was drawn to Table 2 on page 52 of the Third Report, concerning the rights of States that were not directly injured by a breach of an obligation *erga omnes*. This was interpreted as meaning that any State could act on behalf of the victim and had a whole range of remedies, including countermeasures, in cases of well-attested gross breaches.

141. It was suggested that it was important to distinguish between the existence of an obligation and the beneficiary of the obligation. The right to invoke, in the sense of the right to claim that a certain obligation must be fulfilled, should be given to all the States that had a legal interest, albeit not for their own benefit; this was particularly important in the context of human rights obligations infringed by a State with regard to its nationals, which otherwise could not be invoked by any other State.

142. In terms of drafting, the inclusion of the words "to which it is a party" was questioned. It was also suggested that paragraph 2 might begin with the following words: "In addition, for the purposes of these draft articles, a State may invoke certain consequences of internationally wrongful acts in accordance with the following articles", after which paragraph 2 (a) and (b) as proposed by the Special Rapporteur would follow.

(e) Paragraph 3

143. There were different views concerning paragraph 3. Some members felt that it was necessary to include such a provision since the draft articles were to apply to inter-State relations. But, in practice, there were quite a few cases of the international responsibility of States vis-a-vis international organizations or other subjects of international law. The provision was considered to be particularly important with regard to individuals in the human rights context. However, this paragraph was also considered unnecessary by some, since the Commission was dealing with the responsibility of States and not rights that accrued to any other subject of international law. The reference to rights that accrued directly to any person or "entity other than a State" was described as a very broad and even dangerous notion. However, it was also noted that the term "entity" was already used in various international conventions, such as the 1992 Convention on Biological Diversity.

144. It was suggested that since Part One of the draft was acknowledged to cover all international obligations of the State and not only those owed to other States, it might therefore serve as a legal basis when other subjects of international law, such as international organizations, initiated action against States and raised issues of international responsibility.

In contrast, it was considered preferable to restrict the subject matter of Part Two to responsibility as between States because the emergence of different kinds of responsibilities with specific features, such as the responsibility of and to international organizations, individual responsibility and responsibility for violations of human rights, could not be dealt with comprehensively in the foreseeable future. The Special Rapporteur agreed with the distinction between the scope of Part One and of Part Two, and noted that his paragraph (3) was merely a saving clause consequential upon the point that Parts Two and Two *bis* only dealt with the invocation of responsibility by States.

145. There were also suggestions that paragraph 3 should be a separate provision and should be amended by replacing "without prejudice to any rights, arising ..." by "without prejudice to the consequences flowing from the commission of an internationally wrongful act", for the consequences of responsibility were not only rights, but also obligations.

146. The Special Rapporteur stressed the need for paragraph 3 with respect to human rights obligations. This paragraph was necessary to avoid a disparity between Part One, which dealt with all obligations of States, and Part Two *bis*, which dealt with the invocation of the responsibility of a State by another State. Since it was possible for a State's responsibility to be invoked by entities other than States, it was necessary to include that possibility in the draft. It was important to retain the principle in article 40 *bis* or a separate article.

9. Special Rapporteur's concluding remarks on the debate on the right of a State to invoke the responsibility of another State (article 40 *bis*)

147. The Special Rapporteur noted that the deficiencies of article 40 as adopted on first reading had been generally recognized. His proposed treatment of bilateral obligations in a single, simple phrase had been endorsed. However, two approaches had been suggested for multilateral obligations. The first, reflected in his proposal, sought to provide additional clarification and further specification in the field of multilateral obligations. The second approach entailed a series of definitions on the specification of States that were entitled to invoke responsibility without actually saying what they were. The second approach should be used as a fall-back if greater clarity could not be achieved with regard to multilateral obligations. If a general *renvoi* was adopted, the Commission would disbar itself from making any further distinctions between categories of injured States.

148. The Commission's precise concern was to identify those States which ought to be able to invoke the responsibility of another State, and the extent to which they could do so. In that respect he stressed the value of article 60, paragraph 2, of the Vienna Convention on the Law of

Treaties The Commission, in the context of the law of treaties, had distinguished between bilateral and multilateral treaties, and had emphasized that the State specially affected by a breach of a multilateral treaty should be able to invoke that breach An analogy could be drawn for obligations in the field of State responsibility The reference to "specially affected State", reflected in article 40 *bis*, helped to deal with the problem of harm raised by some members, because the State that was injured must surely be regarded as being in a special position There might be a spectrum of specially affected States, but if so it was relatively narrow one

149 Regarding the "article 19 issue", he fully respected the wish of some members that the draft should address the most important obligations, those of concern to the international community as a whole, and the most serious breaches of such obligations He also agreed that there could be breaches of non-derogable obligations which did not raise fundamental questions of concern to the international community as a whole in terms of collective response But, in terms of the right to invoke responsibility, it was not necessary to refer to grave breaches of obligations owed to the international community as a whole Once it was established, as the Court had done in the *Barcelona Traction* case, that all States had an interest in compliance with those obligations, no more need be said for the purposes of article 40 *bis*

150 There had been some disagreement about the reservation concerning the invocation of responsibility by entities other than States as set out in article 40 *bis*, paragraph 3, but the prevailing view seemed to be that it was of value The Special Rapporteur thought it essential, because it resolved the difference in scope between Part One of the draft and the remaining parts

10 Introduction by the Special Rapporteur of Part Two Legal consequences of an internationally wrongful act (*continued*)

Chapter II The forms of reparation

(a) General comments on Chapter II

151 The Special Rapporteur noted that, in accordance with the approach already agreed by the Commission, Chapter II of Part Two dealt with the different forms of reparation from the point of view of the obligation of the State which had committed the internationally wrongful act In the text adopted on first reading, in addition to assurances and guarantees against repetition, three forms of reparation had been envisaged, namely, restitution in kind, compensation and satisfaction The provisions of article 42, paragraph 2, on contributory fault and mitigation of responsibility, as adopted on first reading, also belonged in Chapter II rather than in Chapter I, as restrictions on the forms of reparation He further proposed adding a new article on interest and deleting the reference to it in article 44 The Special Rapporteur noted that

States had accepted the idea that restitution, compensation and satisfaction were three distinct forms of reparation and had generally agreed with the position taken as to the relationship between them

(b) Restitution (article 43)

152 Turning first to article 43, the Special Rapporteur preferred to use the term "restitution" rather than "restitution in kind" in the English version in order to avoid any misunderstanding, while using "*restitution en nature*" in the French version. As to substance, article 43 asserted the priority of restitution. Restitution was the primary form of reparation, with compensation available where restitution did not fully make good the injury. Otherwise, States would be able to avoid performing their international obligations by offering payment. But there were four exceptions to the availability of restitution, and these raised a number of questions. He proposed retaining two of these exceptions.[41] The first exception, dealing with material impossibility, was universally accepted and should be retained. The second exception, dealing with peremptory norms, had been criticized on various grounds and should be deleted: this situation, if it ever arose, would be adequately covered by Chapter V of Part One which, in his view, applied to Part Two. The third exception, dealing with disproportionality of burden and benefit, also should be retained. The fourth exception, dealing with catastrophic situations, had been criticized by many Governments: the situation, if it ever arose, would be adequately covered by paragraph (c), so that paragraph (d) could be deleted.

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[41] The text of article 43 proposed by the Special Rapporteur reads:

Article 43

Restitution

A State which has committed an internationally wrongful act is obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(c) would not involve a burden out of all proportion to the benefit which those injured by the act would gain from obtaining restitution instead of compensation.

A/CN.4/507/Add.1 and Corr.1 and 2, para. 223. For the analysis of this article by the Special Rapporteur, see ibid., paras. 124-146.

(c) Compensation (article 44)

153. The Special Rapporteur said that there was no doubt that compensation should cover any economically assessable damage sustained by the injured State. Although some States had suggested a more detailed definition of compensation and its quantification, caution was needed in elaborating more detailed principles of compensation, which was a dynamic concept strongly influenced by the particular primary rules in play in a given context. He preferred a general formulation accompanied by further guidance in the commentary, to avoid limiting the development of the law on the subject. For these reasons he proposed a simplified version of article 44, with the commentary explaining that lost profits could be compensable, depending on the content of the primary rule in question and the circumstances of the particular case, and with interest being addressed in a separate article.[42]

(d) Satisfaction (article 45)

154. Despite an underlying core of agreement, article 45, as adopted on first reading, gave rise to a number of difficulties. As regards paragraph 1, the association of satisfaction with moral damage was problematic for two reasons. First, the term "moral damage" had a reasonably well-established meaning in the context of individuals, but claims for such damage on their behalf would come under the heading of compensation rather than satisfaction. Second, it was awkward to speak of moral damage in relation to States, since this appeared to attribute emotions, affronts and dignity to them. He proposed replacing the term "moral injury" by the term "non-material injury" (*préjudice immatériel*), thereby avoiding confusion with moral

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[42] The text of article 44 proposed by the Special Rapporteur reads:

Article 44

Compensation

> A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution.

A/CN.4/507/Add.1 and Corr.1 and 2, para. 223. For the analysis of this article by the Special Rapporteur, see ibid., paras. 147-166.

damage to individuals and the use of emotive language for States.[43] He noted that the words "to the extent necessary to provide full reparation" in paragraph 1 indicated that there might be circumstances in which no question of satisfaction arose.

155. As to paragraph 2, there was doubt whether it was intended to be exhaustive, but in his view it should not be. A significant gap was the absence of any reference to the declaration which was one of the main forms of satisfaction and well-established in judicial practice. Since the draft articles were intended to apply directly to State-to-State relations, he proposed including the notion of an acknowledgement by the responsible State as the equivalent, in terms of State-to-State conduct, of a declaration granted by a tribunal. He further proposed listing it as the first and most obvious form of satisfaction. The commentary would explain that, where a State declined to acknowledge that it had committed a breach, the corresponding remedy obtained in any subsequent third-party proceedings would be a declaration.

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[43] The text of article 45 proposed by the Special Rapporteur reads:

Article 45

Satisfaction

> 1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.
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> 2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.
>
> 3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, *inter alia*:
>
> [(a) nominal damages;]
>
> (b) damages reflecting the gravity of the injury;
>
> (c) where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.
>
> 4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State.

A/CN.4/507/Add.1, para. 223. For the analysis of this article by the Special Rapporteur, see ibid., paras. 167-194.

156 Paragraph 2 (a) referred to apology, which was frequently given by States in the context of wrongful conduct. He proposed that an acknowledgement or apology should be treated separately from the other forms of satisfaction in a new paragraph 2, since these were the minimum forms of satisfaction and the basis on which any other form of satisfaction would be granted. The other more exceptional forms of satisfaction, which might be appropriate in certain cases, would be contained in new paragraph 3.

157 Referring to the other forms of satisfaction, the Special Rapporteur proposed deleting nominal damages in existing paragraph 2 (b) since the reasons for such damages in national legal systems were inapplicable in international litigation and the declaratory remedy was almost always sufficient. He noted that nominal damages would not be precluded in appropriate cases if the paragraph contained a non-exhaustive list of the forms of satisfaction.

158 As regards existing paragraph 2 (c), the Special Rapporteur recommended that this simply provide for the award of damages by way of satisfaction, where appropriate. The words "in cases of gross infringement" unduly limited the normal function of satisfaction in respect of injuries which could not be qualified as "gross" or "egregious", such a limitation was contrary to the relevant jurisprudence. In his view, the award of substantial (and not merely nominal) damages in appropriate cases was an aspect of satisfaction. On the other hand, paragraph 2 (c) did not include punitive damages, a subject that would be taken up later in the context of a possible category of "egregious breach". If awards of punitive damages were to be allowed at all, special conditions needed to be attached to them.

159 The fourth form of satisfaction in existing paragraph 2 (d) dealt with disciplinary action or punishment of the persons responsible, who might be officials or private individuals. The Special Rapporteur proposed deleting the reference to "punishment" which implied individual guilt, a matter which could only be determined in the proceedings and which could not be presumed. Again it was not necessary to cover all possible types of procedures (e.g. inquiry) if the paragraph was understood to be non-exhaustive.

160 The issue of limitations on satisfaction was dealt with in existing paragraph 3. The Special Rapporteur noted that some States had proposed deleting the term "dignity" as meaningless and as allowing for satisfaction to be evaded. He felt however, in light of the earlier history of abuses, that some guarantee was required. he proposed a provision excluding any form of satisfaction that was disproportionate to the injury or that took a form humiliating to the responsible State.

(e) Interest (article 45 *bis*)

161 The Special Rapporteur proposed including an article dealing with the general question of entitlement to interest, based on the proposition that where a principal sum owed had not been paid, interest was due on that sum until such time as it was paid [44] In terms of the starting date for payment of interest, the question was whether the compensation should have been paid immediately upon the cause of action arising, within a reasonable time after a demand had been made or at some other time The terminal date for payment of interest would be that on which the obligation to pay had been satisfied, whether by waiver or otherwise He had used the wording "Unless otherwise agreed or decided" because States could agree that there should be no award of interest and also because tribunals had in some cases exercised some flexibility about interest that was inconsistent with the idea that there was a simple right to interest covering any fixed period He believed that the provision should neither mandate nor rule out the possibility of compound interest, in the light of the limited international jurisprudence on the point, it was too much to say that compound interest was available as of course, but neither could it be excluded in appropriate cases where this was necessary to provide full reparation

(f) Mitigation of responsibility (article 46 *bis*)

162 The Special Rapporteur recalled that, except for the situation of contributory fault, the question of the mitigation of responsibility had not been covered in the draft articles adopted on first reading

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[44] The text of article 45 *bis* proposed by the Special Rapporteur reads

Article 45 *bis*

Interest

> 1 Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation The interest rate and mode of calculation shall be those most suitable to achieve that result
>
> 2 Unless otherwise agreed or decided, interest runs from the date when compensation should have been paid until the date the obligation to pay compensation is satisfied

A/CN 4/507/Add 1, para 223 For the analysis of this article by the Special Rapporteur, see ibid , paras 195-214

163 Subparagraph (a) of his proposal[45] dealt with the case in which an injured State, or a person on behalf of whom a State was claiming, contributed to the loss by negligence or wilful act or omission, for which various terms such as "contributory negligence" and "comparative fault" were used by different legal systems There was well-established jurisprudence that the fault of the victim, where the victim was an individual, could be taken into account in the context of reparation In his view, considerations of equity required that the principle be extended to injured States, to avoid a responsible State being required to pay for damage or loss suffered by reason of the conduct of the injured State

164 The Special Rapporteur also observed that a further concern was ensuring that injured States not be overcompensated for loss He therefore proposed a new provision, as subparagraph (b), dealing with mitigation of damage, based on the formulation of that principle by the Court in the *Gabčikovo-Nagymaros* case Mitigation of damage related to the attenuation of the primary amount, and prevented a State that unreasonably refused to mitigate damage from recovering all of its losses

11 Summary of the debate on Part Two (*continued*)

Chapter II The forms of reparation

(a) General comments on Chapter II

165 Agreement was expressed with the general approach of the Special Rapporteur to Chapter II The Special Rapporteur had been right to avoid excessive detail which could create

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[45] The text of article 46 *bis* proposed by the Special Rapporteur reads

Article 46 *bis*

Mitigation of responsibility

In determining the form and extent of reparation, account shall be taken of

(a) the negligence or the wilful act or omission of any State, person or entity on whose behalf the claim is brought and which contributed to the damage,

(b) whether the injured party has taken measures reasonably available to it to mitigate the damage

A/CN 4/507/Add 1, para 223 For the analysis of this article by the Special Rapporteur, see ibid , paras 215-222 new areas of conflict among States, even if the wrongdoing State had already acknowledged responsibility. On the other hand, certain doubts were expressed, not only about the changes proposed by the Special Rapporteur, but also about the approach adopted, which was considered superficial and insufficient, having regard to the practical importance of compensation and the guidance now offered by decisions of courts and tribunals.

166. As to the proposed new emphasis on the obligation imposed on the responsible State, the view was expressed that in Part Two the Commission would have to go beyond a statement of principles, and therefore it would have been better to recognize the injured State as the driving force behind reparation. Others noted that the rights of the injured State would be separately covered, so that nothing was lost by the change in terminology, while the text gained in its capacity to deal with claims brought by "differently injured" States.

167. In support of the latter view, the Special Rapporteur explained that the articles were formulated in terms of the obligation of the responsible State so as to leave open the question of who was entitled to invoke responsibility, which could be considered only at the time it was invoked. Referring to the "right" or "entitlement" of the injured State, as was done during the first reading, implied a bilateral form of responsibility. Yet, in some situations, several States could be affected or concerned, some more than others. Likewise, it had to be recognized that obligations could arise towards different entities, or towards the international community as a whole. The proposed drafting allowed for these various possibilities.

168. Support was expressed for the Special Rapporteur's proposal that the former title of Chapter II, "Rights of the injured State and obligations of the State which has committed an internationally wrongful act", be replaced by the shorter title, "The forms of reparation". The new title was not only shorter and simpler, but would also avoid the implication that the rights of "injured States" were in all cases the strict correlative of the obligations of the responsible State. It was also suggested that the new title could be further refined to read "Forms and modalities of reparation". In response, the Special Rapporteur pointed out that a reference to "modalities" would be more a matter for Part Two *bis*, on the implementation of State responsibility. Instead, Chapter II of Part Two concerned itself with the basic forms of reparation, i.e. the content, so far as the responsible State was concerned, of the basic obligation to provide full reparation set out in Chapter I.

169 Some members noted that the discussion so far largely overlooked the question of State "crimes" The Commission was reminded of its late consideration of the matter during the first reading, which had resulted in the inclusion in the part, referring to delicts, of consequences that should have been reserved for crimes, thereby depriving articles 51 to 53, on the consequences of crimes, of much of what might otherwise have been their substance The concept of crimes, according to this view, was implied in paragraph 126 of the report, in which the Special Rapporteur was compelled to draw a distinction between acts contrary to an ordinary rule of international law and a breach of a peremptory norm of general international law - a distinction which could constitute an acceptable definition of "crime"

(b) Restitution (article 43)

170 Different views were expressed as to the priority of restitution over compensation That priority was criticized as being too rigid and inconsistent with the flexibility actually displayed by tribunals Others suggested that the fact that compensation was the most frequently used form of reparation, was due to the limitations inherent in restitution, and not proof of its subsidiary role as a matter of principle

171 In addition, if the practical importance of the primary rules was recognized, there would be no need to determine whether or not restitution was the generally applicable form of reparation As such, it was considered preferable to give priority to the decisions of tribunals, although caution was advised since the applicable law was not always clearly stated in those decisions Similarly, it was suggested that the commentary could explain that some cases may be resolved by means of a declaratory judgement or order without giving rise to restitution as such

172 The Special Rapporteur observed that there was no requirement that all attempts to secure restitution be first exhausted, and that in those cases in which the injured State had the choice to prefer compensation, the election to seek compensation rather than restitution would be legally effective The rare cases where the injured State had no choice about restitution, i.e. where restitution was the only possible outcome, were better covered under the notion of cessation There were also cases where restitution was clearly excluded, for example, because the loss has definitively occurred and could not be reversed Furthermore, in some circumstances, other States would be able to invoke responsibility Those States might substitute for the injured State, and would not be compensated themselves, but would be entitled to insist not just on cessation, but on restitution as well Support was expressed in the Commission for this view

173 In his Third Report, paragraph 142, the Special Rapporteur had expressed the view that restitution might be excluded in cases where the respondent State could have lawfully achieved the same or a similar result without breaching the obligation Some members disagreed if there was a lawful way to achieve a given result, the fact that the respondent State had not taken advantage of that way did not in itself exonerate it from the obligation of restitution In response, the Special Rapporteur noted that in theory, restitution had primacy, yet in practice, it was exceptional The challenge was to reconcile theory and practice

174 Differing views were expressed regarding the objective of restitution On the one hand, it was argued that the objective was to remove the effect of the internationally wrongful act, by re-establishing the *status quo ante* This was the approach of the earlier version of article 43 Others favoured a duty to establish the situation that would have existed without the wrongful act, and not the mere re-establishment of the *status quo ante* It was observed that in the *Chorzow Factory* case, the formula was that reparation must, so far as possible, wipe out all the consequences of the unlawful act and re-establish the situation which would in all probability have existed if that act had not been committed As such, ***restitutio in integrum*** was the preferred reaction to an internationally wrongful act, subject to the choice of the injured State In response, it was suggested that this approach confused restitution as a narrower remedy implying a return to the *status quo ante* and reparation which had additional elements, in particular compensation

175 Different views were expressed about the Special Rapporteur's proposal to delete the words "in kind" after "restitution" Some favoured such deletion, noting that it solved the problem of whether reference should be made to restitution in kind or ***restitutio in integrum*** Others thought the longer formula was established

176 As to the drafting, it was suggested that the opening phrase "A State which has committed an internationally wrongful act", be rendered as "A State responsible for an internationally wrongful act" It was also proposed that the word "obliged" be rendered as "bound", and that it be explicitly provided that restitution must be made to the injured State Moreover, it was suggested that in some instances, "restoration" would be more precise than "restitution"

177. The view was expressed that, since restitution was itself an obligation, the provisions of the draft articles, including those dealing with circumstances precluding wrongfulness, were applicable to it In response, the Special Rapporteur said that the effect of the circumstances

precluding unlawfulness in Part One was to suspend compliance with the obligation under consideration for a period of time The courts had always made a distinction between the continued existence of the underlying obligation and the exemption from performance of the obligation at a given time In his view, circumstances precluding wrongfulness were generally speaking supplementary to the exceptions given in article 43, and that the impossibility of proceeding with restitution referred to a permanent impossibility rather than a temporary one During the subsequent debate, doubt was expressed whether the circumstances precluding the wrongfulness of an act also applied to the part of the draft articles under consideration if this was intended it should be clearly spelt out

178 The view was also expressed that interim measures of protection and similar measures were not included in the classic concept of restitution, and that these should be distinguished from restitution in the context of the subsequent proceedings on the merits The Special Rapporteur agreed, noting however that interim remedies could be directed at cessation, though in the context of provisional measures no decision would have been made that the act in question was definitively unlawful

179 Support was expressed in the Commission for the proposed deletion of the exception contained in paragraph (b), as adopted on first reading, relating to breaches of peremptory norms It was noted that the question was resolved by the general rules of international law, and was already covered under article 29 *bis* It was, however, noted that the draft articles needed to reflect the proposition that if a "crime" in the sense of article 19 had been committed, or a norm of *jus cogens* had been violated, restitution could not be waived by the injured State in favour of compensation, since the vital interests of the international community as a whole were at stake in such cases

180 The proposed deletion of paragraph (d), as adopted on first reading, concerning jeopardy to the political independence or economic stability of a State, also received support The exception was described as being too general in character, thus risking overly broad interpretations in practice It was adequately covered by the exception in paragraph (c)

181 It was suggested that a further exception be included, relating to cases where restitution is prevented by an insurmountable legal obstacle, not necessarily relating to the violation of a peremptory norm The case of nationalization was cited as an example It was maintained that in light of several General Assembly resolutions of the United Nations, the legality of nationalizations had been affirmed, and that a State which has carried out a nationalization was

not required to provide restitution. But in such cases, issues of restitution did not arise: by definition the taking itself was lawful and the question became one of payment for the property taken. Where the taking was unlawful per se, different considerations might apply.

182. Regarding paragraph (a), it was queried whether "legal" impossibility was included in the phrase "material impossibility". This situation arose, for instance, under the primary rules of international law, States were required to adopt certain types of legislation, but did not do so. There were limits to the changes that could be made under some national legal regimes. For example a contrary Supreme Court decision in a given case could not be overturned, thus rendering restitution impossible.

183. Others noted that the State was responsible for the actions of its executive, legislative and judicial arms, and no governmental organ should be able to escape the duty to rectify any violation of international law that might occur. Moreover although there might be no legal remedy within the domestic system for a final judgement not subject to appeal, reversal of the results of judgments had occurred on issues concerning international law in various countries. In principle, internal law could never be a pretext for refusing restitution and thus could not constitute a case of impossibility. It was considered essential to ensure that no margin be left for more powerful States to advance unilateral interpretations of "impossibility". True cases of legal impossibility were very rare, and a reference to material impossibility was sufficient.

184. The Special Rapporteur suggested, in light of the debate, that the Commission needed to reconsider draft article 42, paragraph 3, affirming the basic principle that a State could not rely on its domestic law as an excuse for not fulfilling its international obligations. Introducing the phrase "legal impossibility" could amount to a revision of that basic principle. What was true was that a change in the relevant legal position could result in actual impossibility, for example, property seized from one person could not be restored if it had already been validly sold to another. The situation was more complicated where the rights of an individual were involved and international law acted as a critical standard, as it did in the human rights field.

185. Reference was further made to the decision of the Central American Court of Justice in the *El Salvador v. Nicaragua* case,[46] mentioned in paragraph 128 (b) of the report, where the Court had avoided addressing the nullity of a treaty between Nicaragua and a third State.

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[46] (1917) 11 *AJIL (Supplement)*, p. 3.

(the United States) but had not considered that restitution was necessarily impossible On the contrary, it held that Nicaragua was obliged to use all means available under international law to restore and maintain the situation which had existed before the conclusion of the treaty

186 With regard to paragraph (c), while support was expressed for the provision, it was queried whether the reference to "those injured" referred to the State, as had been the case in the version adopted on first reading, or whether it also covered individuals A preference was expressed for not making any reference to the injured entity at all Alternatively, it was suggested that the term "injured" be replaced with "injured State or States"

187 The notion of proportionality in paragraph (c) did not only concern cost and expense but also required that the gravity or otherwise of the breach be taken into account But this could be covered either in the text or the commentary, in any event paragraph (c) was necessary especially in light of the proposed deletion of paragraph (d)

(c) Compensation (article 44)

188 Strong support was expressed for the inclusion of a concise provision on compensation

189 It was noted that the various judicial decisions on this issue, such as the *Rainbow Warrior* case, had prescribed a certain amount of compensation without indicating precise criteria used for calculating the amount, and that a great deal depended on the circumstances of the breach and the content of the primary rule In many instances, States reached agreement on compensation for an internationally wrongful act, but on an *ex gratia basis* In the context of world trade and environmental issues, States had created special regimes for compensation, which excluded the application of general principles All the Commission could do was devise a flexible formula leaving the development of rules on the quantification of compensation to be developed by tribunals and practice

190 Conversely, the view was expressed that article 44, as proposed by the Special Rapporteur, was essentially a chapeau article retaining only the priority accorded to restitution A more detailed elaboration of the principle of compensation was required so as to give greater guidance to States and tribunals Furthermore, the succinct treatment of the question of compensation created the impression that the general principle was restitution, and nothing less, and that, in technical terms, compensation only came into play if there had not been any restitution It was suggested that additional determining factors be mentioned, including that it should compensate both material damage and moral damage when the moral damage was

suffered by an individual, that it must compensate *damnum emergens* and *lucrum cessans* at least when both were certain, that only "transitive" damage - that which resulted from a necessary and certain link of causality with the internationally wrongful act - should be liable for compensation, and that subject to article 45 *bis*, the damage should be assessed on the date of commission of the internationally wrongful act. Preference was also expressed for dealing with the question of loss of profits in the draft articles, and not merely in the commentary. The notion of "full reparation", endorsed by the Court in the *Chorzow Factory* case, required that loss of profits be compensated as a general matter and not only on a case by case basis.

191. It was suggested that compensation should not go beyond the limit of injury or damage caused by the wrongful act or conduct so that possible abuses may be avoided. In that regard, agreement was expressed with the proposal to limit compensation by a provision such as that found in article 42 (3), as adopted on first reading. It was noted that the question of crippling compensation was worth examining, since it could lead to widespread violations of human rights. At the same time, consideration should be given to the economic capacity of the State to compensate the victims of mass and systematic violations of human rights.

192. The Special Rapporteur noted that the Commission was faced with a choice between two solutions: it could either draft article 44 succinctly, stating a very general principle in flexible terms, or it could go into some detail and try to be exhaustive. If the Commission opted for the long version, it would have to include a reference to loss of profits. He had deleted the reference to loss of profits principally because some Governments had been of the opinion that the first reading version had been formulated in such a weak way that it had the effect of "decodifying" international law. Others suggested an intermediate solution, with a concise version retaining a reference to loss of profits.

193. It was queried whether the word "economically" was appropriate to cover, for example, the wrongful extinction of an endangered wildlife species of no economic use to humans. It was proposed that the word "financially" be used instead. It was also noted that the answer was also to be found in the meaning of "moral damage" in article 45. As such, it was proposed that the phrase "material" damage be used in article 44, and "non-material" damage in article 45. As to whether moral damages belonged in article 44, the Special Rapporteur recalled that the former Special Rapporteur, Mr. Arangio-Ruiz, had solved the problem by saying that article 44 covered

moral damage to individuals and article 45 covered moral damage to States.[47] That solution had been controversial because the term "moral damage" could apply to things so disparate as the suffering of an individual subjected to torture and an affront to a State as a result of a breach of a treaty. Others suggested that the reference to "economically assessable" did cover material damage, moral damage and loss of profits. Compensation for moral damage was confined to the damage caused to natural persons, leaving aside the moral damage suffered by the victim State. It was pointed out that this reflected judicial practice where pecuniary compensation had been granted in order to compensate moral damage suffered by individuals, especially in cases of cruel treatment.

194. It was noted that while article 43 made reference to "those injured", article 44 did not state who suffered damage, i.e. whether it was the State, or the real persons or entities injured, such as individuals. One reason for this imprecision was that account had to be taken of the wide variety of different cases: individual claims by companies or persons before national or international courts or commissions, claims by Governments on behalf of individuals or on their own account, claims by injured States and by "other" States, etc.

195. Reference was made to the decision of the ICSID tribunal in the *Klockner*[48] case, where both parties were held to have violated the contract in question, with significant consequences in terms of reparation. The Special Rapporteur pointed out that part of the solution was to be found in what was known as "set-off", which would be a procedural issue before a court and was not part of the law of responsibility. In fact the decision in the *Klockner* case had been annulled, and the case had been settled by agreement before any further decision on compensation.

196. Reference was also made to the question of the proper measure of compensation for expropriation, which article 44 did not address, and which had been a source of conflict between developing and developed countries. The classic western position of "prompt, adequate and effective compensation" required, *inter alia*, that compensation be based on the value at the time of taking and that it be made in convertible currency, without restrictions on repatriation. However, it was noted that the foreign exchange implications of that formula could impose an

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[47] See, the *Second report of the Special Rapporteur on State Responsibility, Mr. Gaetano Arangio-Ruiz*, in A/CN.4/425 and Corr.1, and Add.1 and Add.1/Corr.1, para. 191.

[48] *Klockner v. Cameroon*, ICSID Reports, vol. 2, p. 4.

embargo on any significant restructuring of the economy by a developing country that faced balance-of-payments difficulties. Current international practice revealed that considerable inroads had been made into the traditional formulation. Moreover, General Assembly resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources had prescribed the payment of "appropriate compensation" in the event of nationalization, expropriation or requisitioning, which was a significant departure from the phrase "prompt, adequate and effective", although the General Assembly had failed to define it. However a number of speakers stressed that this long-standing debate had nothing to do with the content of article 44. Nationalization was a lawful act, whereas article 44 dealt with internationally wrongful acts. The Special Rapporteur agreed and reiterated that it was not the Commission's function to develop the substantive distinction between lawful and unlawful takings or to specify the content of any primary obligation.

197. Several members stressed that it was not enough to accept the principle that primary rules played an important role in determining whether compensation was justified. The different classes of cases also had to be classified, guidance was to be obtained here less from legal writing and more from such arbitral decisions as the *Aminoil* case.[49] Article 44 should include a qualifier along the lines of "unless the primary rules indicate a different solution". As against this it was noted that the rules stemming from judicial decisions and arbitral awards were applied only occasionally, and that questions of State responsibility were more often dealt with through direct contact among States or even through national courts. Such practice was not necessarily reflected in arbitral awards. In response, the Special Rapporteur pointed out that, however important the primary rules were, it was difficult to draw the appropriate conclusions in the drafting of the articles themselves. A discussion of the various points in the commentary was more appropriate.

(d) Satisfaction (article 45)

198. There was support for the provision as proposed by the Special Rapporteur, which maintained elements of flexibility especially through the notion of "offer". The objective was to set out a range of political options and entitlements open to States following the commission of

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[49] *Aminoil Case (Kuwait v. American Independent Oil Co.)*, 27 I.L.M. 976 (1982).

an internationally wrongful act Moreover satisfaction could be either autonomous or complementary to restitution and/or compensation, and this was made clear by the proposed provision

199 Others expressed the view that article 45 was a hybrid provision, contained a mixture of the law relating to the quantitative assessment of damage and measures of satisfaction *stricto sensu* As the latter were a form of political punishment of States they were no longer applicable In practice, satisfaction was an institution to which States rarely had recourse It was thus queried whether legal rules on satisfaction really existed, and even whether the wrongdoing State was under an obligation to offer satisfaction to the injured State Instead, the draft articles should either omit or minimize "satisfaction" as a discrete remedy and focus on the "missing" remedy of declaratory relief, whether by way of orders or declarations of rights, which was not generally accepted as a diplomatic form of reparation, but which had legal consequences

200 Others disagreed with the attack on satisfaction as a discrete form of reparation In their view, satisfaction was a normal form of reparation and the fact that courts made awards and declarations in terms of satisfaction bore that out It was true that the decision in the *Corfu Channel* case[50] was unusual in that the respondent State had not actually asked for damages, the declaration awarded there by way of satisfaction had been all that the Court could do But that case had led to a consistent and valuable practice of declarations by way of satisfaction, which the draft articles should recognize

201 The Special Rapporteur noted that an unnecessary distinction between the diplomatic and legal spheres was being made Since the Commission was concerned to determine the rules that were applicable to inter-State relations, the rules of responsibility could not be formulated in terms of the powers of courts, thus creating the problem of "missing remedies" His proposal distinguished between the "normal" method of satisfaction, i e the acknowledgement that a breach existed, and the forms referred to in article 45, paragraph 3, which were exceptional The failure of such acknowledgement was the basis for a declaration by a court or tribunal in any subsequent proceedings

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[50] *Corfu Channel Case (Merits)*, *I.C.J Reports*, 1949, p 35

202. Regarding paragraph 1, there was agreement with the proposed emphasis on the obligation of the State which had committed an internationally wrongful act to offer satisfaction. Support was also expressed for the proposed substitution of the term "moral damage" by "non-material injury". The proposed change allowed for a symmetrical contrast between article 44, concerning material injury, and article 45, concerning non-material injury.

203. Conversely, the view was expressed that the proposed text was too narrow, since it limited the institution of satisfaction to non-material or moral injury. The suggestion was made that an injured State could also enjoy a right to satisfaction in the context of material injury. The term "non-material injury" omitted the crucial point that the purpose of satisfaction was to repair the moral damage suffered by the State itself.

204. It was noted that, whereas the wrongdoing State was "obliged to make restitution" and "obliged to compensate" in articles 43 and 44, respectively, under article 45, it was obliged simply to "offer" satisfaction, reflecting the perception that satisfaction could not be defined in the abstract. But others thought this introduced an unsatisfactory form of subjectivity: whether an offer of satisfaction was adequate in terms of the standard of full reparation could be judged, in essentially the same way as the adequacy of an offer of compensation.

205. As to acknowledgement of the breach, the view was expressed that expressions of regret or formal apology might imply such an acknowledgement and thus render it unnecessary.

206. There was support for mentioning acknowledgement of the breach first, as proposed by the Special Rapporteur, and which conformed with the approach in the *Corfu Channel* case. Conversely, it was queried whether acknowledgement should be first, at the State-to-State level, since some States offered apologies freely, without acknowledging the breach, in a manner comparable to *ex gratia* payments. In other instances, apologies were offered to avoid any further consequences of a breach. Faced with possible or pending litigation, States would be well advised to avoid any acknowledgement, even if it might possibly form part of an overall settlement, expressly or by implication.

207. The use of the phrase "as appropriate" was considered too imprecise, and only acceptable if the cases referred to were explained in the commentary and illustrated by examples. It was suggested that paragraphs 1 and 2 be combined in order to provide a more precise draft. A single paragraph could begin with the phrase, as in the article adopted on first reading: "Satisfaction may take one or more of the following forms", followed by a non-exhaustive list of all the forms of satisfaction, beginning with acknowledgement of the breach.

208. Concern was also expressed that the proposed paragraph 2 downgraded the status of apologies, whereas on first reading apologies had figured as a self-contained form of satisfaction. But it was noted that there was a political element to apologies, since they usually resulted from negotiated settlements. It was doubtful whether sufficient *opinio juris* existed for the recognition of apologies as a form of satisfaction.

209. In relation to paragraph 3, support was expressed for a non-exhaustive list of measures, as well as for the reference to "full reparation". However, the phrase "where circumstances so require" was considered too general since States, courts and arbitrators could benefit from knowing precisely in what cases and circumstances a particular step should be taken.

210. As regards paragraph 3, subparagraph (a), a preference was expressed for retaining a reference to nominal damages, which could be inserted in paragraph 2. The Special Rapporteur noted that if article 45, paragraph 3, was inclusive then nominal damages could be subsumed under subparagraph (b) relating to damages reflecting the gravity of the injury.

211. Concerning subparagraph (b), it was observed that satisfaction could also be accompanied or preceded by the payment of damages, even if there was no material damage, a possibility implied by the term "full reparation". Conversely, it was stated that the text incorrectly implied that such damages were a component of full reparation, and were necessary in order to eliminate all the consequences of the wrongful act. The concept of damages in article 45 overlapped with article 44. Hence subparagraph 3 (b) could be moved to article 44, or to a specific provision on damages.

212. The view was expressed that damages on a more than nominal scale were conceivable only in cases of "gross infringement" of a rule of fundamental importance, not only for the injured State, but also for the international community as a whole, i.e. that of State "crimes". As such, the provision should be transferred to the chapter on the consequences of crimes. A preference was further expressed for restricting the scope of damages to cases of "gross infringement of the rights of the injured State", as stipulated in the first reading version. Conversely, it was maintained that paragraph 3 (b) should not be restricted to crimes and should be retained, as proposed by the Special Rapporteur. Furthermore, it was noted that the expression "gravity of the injury" could be interpreted either to refer to the gravity of the

213. Disagreement was expressed with the idea that punitive damages and moral damage should be discussed under the heading of "Satisfaction". The subparagraph could be deleted, although without prejudice to any future consideration of the issue of punitive damages by the Commission, for example in the context of grave breaches, particularly international "crimes" contemplated by article 19, as adopted on first reading.

214. The Special Rapporteur stressed that paragraph 3 (b) did not concern punitive damages but what were referred to in some legal systems as "aggravated" or "expressive" damages. As demonstrated by the *I'm Alone* case,[51] in some situations it was necessary to recognize the gravity of a wrong, and those situations were not confined to "grave breaches".

215. The meaning of the expression "serious misconduct", which could imply a reference to negligence, was queried. It was noted that since the introductory phrase to paragraph 3 restricted its scope to cases where "circumstances so require", the adjective "serious" could be deleted. It was also considered necessary to clarify that the criminal conduct of private persons related to State responsibility only in relation to the State's breach of the duty of prevention; indeed this implied that the scope of the provision should be restricted solely to criminal acts of State agents. Any penal action against private individuals was nothing but the belated performance of a primary obligation. Moreover, some primary rules already required action to be taken against State officials in cases of misconduct; in light of these provisions it was doubtful whether the paragraph was necessary.

216. It was proposed that specific mention could be made in article 45, or in the commentary, to the holding of an inquiry into the causes of an internationally wrongful act, as a form of satisfaction. However, caution was voiced as to conceiving inquiry as a form of satisfaction per se: it was more properly considered as part of the process leading to satisfaction.

217. According to some members, factors favouring the retention of paragraph (d) included recent developments in the field of international criminal law. In this connection, it was proposed that a clause be added to the end of paragraph 3 (c) requiring that the disciplinary or penal action be taken by the respondent State itself, or that there be extradition to another State or transfer to an international criminal tribunal with jurisdiction over the alleged crime.

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[51] UNRIAA, vol. III, p. 1609 (1935).

218. With regard to paragraph 4, it was suggested that it be moved to either article 37 *bis* or into a *chapeau* to Chapter II.

219. The view was expressed that it was unnecessary to refer to "humiliation" in article 45, since there was no need to avoid humiliating a responsible State that had itself humiliated the injured State. The requirement of proportionality was sufficient. Even the act of acknowledging the breach might be considered as humiliating by certain States and therefore the rule in paragraph 4 must not be understood as applicable *in extenso*.

220. Conversely, a strong preference was expressed for retaining the reference to humiliation, since satisfaction should avoid humiliation: there was still a strong concern about imbalances of power that had historically enabled powerful States to impose humiliating forms of satisfaction on weaker States. In that regard, it was suggested that the word "should" be replaced by "must" or "shall". In this regard, a reference could be included to the sovereign equality of States.

(e) Interest (article 45 *bis*)

221. Support was expressed for the main thrust of article 45 *bis*, especially in light of the cursory treatment given to the question of interest in the draft articles adopted on first reading. However, the provision had to be consistent with the function of Part Two, namely to ensure that the injured State was made whole by the wrongdoing State. There was thus a close connection with article 44, and the question of interest should either be addressed in the framework of article 44, possibly as a second paragraph to article 44, or placed as a separate article immediately after article 44, dealing only with interest due on compensation payable under article 44, as well as with the issue of loss of profits and compound interest. In the latter regard, the view was expressed that care had to be taken to avoid double recovery. Moreover, it could not be assumed that the injured party would have earned compound interest on the sums involved if the wrongful act had not been committed. The Special Rapporteur noted that although the principal sum on which interest was payable would normally involve compensation under article 44, circumstances could be envisaged where that was not the case, but interest was nonetheless payable.

222. It suggested that the second sentence of paragraph 1 was unnecessary and should be deleted. In paragraph 2, the phrase "[u]nless otherwise agreed or decided" was likewise unnecessary since it was a precaution applicable to all the provisions of Chapter II and indeed to

practice, interest was payable from the date of the wrongful act, or from the date on which the damage had occurred or, more precisely, from the date from which the compensation no longer fully covered the damage. Article 45 *bis* could be reformulated accordingly. In response, the Special Rapporteur noted that, in principle, the decisive date was that on which the damage had occurred, but that some flexibility was characteristically shown by tribunals and this should be reflected in the text.

(f) Mitigation of responsibility (article 46 *bis*)

223. Support was expressed for the inclusion of article 46 *bis*, which contained elements of progressive development. However, it was doubted whether the conditions for mitigation of responsibility also applied to restitution. If so, the object of the restitution could be restricted since the wrongdoing State might have some say in deciding on the extent of the restitution. It was observed that the title of the proposed draft article did not accurately reflect its contents.

224. Proposed draft article 46 *bis*, while an improvement on former article 42, paragraph 2, nonetheless raised various concerns relating to the possible - albeit unintended - mixing of the measure of damages with the primary rule establishing responsibility. It needed to be made clear that the point at issue was not the primary rules but a factor that might be taken into account in determining the magnitude of the damages owed.

225. Concerning subparagraph (a), the view was expressed that only "gross" negligence or serious misconduct could be regarded as limiting the extent of reparation.

226. In response to a question, the Special Rapporteur indicated that subparagraph (b) was not limited to the doctrine of "clean hands", which had been considered at the Commission's previous session.[52] He referred to the *Gabčíkovo-Nagymaros* case where the International Court of Justice had recognized a "duty" to mitigate damage, i.e. in determining the amount of reparation it was possible to take into account the question whether the injured State had taken reasonable action to mitigate the damage. But reference to such a "duty" must not be taken to imply that if that obligation was violated, secondary rules applied and reparation had to be made. Instead, failure to mitigate would lead to a limitation on recoverable damages. However, the view was also expressed that subparagraph (b) could create difficulties insofar as it would require States to take precautionary measures with regard to all possible kinds of breaches of international law in order to obtain full reparation.

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[52] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10),

12. Special Rapporteur's concluding remarks on Chapter II

227. The Special Rapporteur agreed with the observation that the extent of the obligation of restitution (art. 43) depended on the primary rules at stake. There was thus a "legal" element to impossibility, but provided it was made clear that article 29 *bis* applied to Part Two, paragraph (b) as adopted on first reading was unnecessary. Arguments by States that restitution was impossible for domestic legal reasons did not constitute justifications as a matter of international law, but it was clear that the primary rules of international law could come into play at that stage.

228. As to the question of the narrow as opposed to the broad conception of restitution, he favoured the narrow conception. The *Chorzow Factory* dictum was about reparation in the general sense, and was therefore about *restitutio in integrum* in the general sense; it was not about restitution in the article 43 sense, which had already been excluded by the time the Court had issued its dictum because it had been disavowed by Germany. It was already stated in Chapter I that reparation must be full. If restitution was not understood in this narrow sense, an impossible overlap would arise between article 43 and other forms of reparation. The Commission had been very clear on first reading in adopting this approach, and it had not been criticized for that by Governments.

229. As to the question to whom restitution should be made, the articles had to be drafted so that they could be invoked by the injured State in a bilateral context, by one of several States injured in a multilateral context, or indeed by States which were in the position of Ethiopia and Liberia in the 1966 *South-West Africa* cases.[53] Restitution could be sought by different States, and compensation could be sought on behalf of a variety of interests, and this had to be reflected in the text.

230. As to draft article 44 on compensation, the Special Rapporteur was prepared to consider a more detailed provision, on the understanding that it was essential to take account of the different legal relations involved, including legal relations with non-State entities. A modern conception of responsibility required that it be conceived of in a multi-layered manner.

231. He observed further that a majority of the Commission had favoured the reintroduction of the reference to loss of profits. However, the difficulty with that in regard to article 44, as adopted on first reading, was that it decodified the existing law on loss of profits.

The reintroduction of the reference would necessitate a further article or paragraph. The issue could also be relevant in connection with article 45 *bis*. His own preference was to retain the separate identity of article 45 *bis* and not to subsume it into article 44. Since a specific formulation on interest was possible, a specific treatment of loss of profits could also be possible.

232 As to the question of moral damage, it was clear that article 44 covered moral damage to individuals, whereas what was called moral damage to States was intended to be dealt with in article 45. The use of the term "moral damage" was confusing for reasons he had explained in relation to article 45. Instead, the content of the provision should be made clear, and questionable terms like "moral" should be left to the commentaries.

233 Concerning draft article 45 on satisfaction, the debate on the draft article had revealed a wide divergence of views. Satisfaction was well founded in doctrine and jurisprudence, and its elimination would constitute a fundamental change. The concept of satisfaction had a hybrid function with some aspects being synonymous to reparation, as was the case with article 41 of the European Convention on Human Rights. The non-material aspects of international conflicts were frequently important and that it was necessary to resolve the differences in a way that "satisfied" both parties. This need for an agreement in order for satisfaction to take place was implicit in the use of the verb "offer".

234 While recognizing that the institution of satisfaction had been the object of serious abuses in the past, the Special Rapporteur felt that this was not reason enough to dispense with it, but that it needed to be re-examined in order to fulfil its contemporary functions. The main problem posed by article 45, as adopted on first reading, was that it had not provided for the acknowledgement of a breach by the State which had committed it nor, in a judicial context, for the declaration of the existence of a breach. In modern practice, the normal form of satisfaction was the declaration of the existence of a breach, such as in the *Corfu Channel* case. Expressions of regret or apologies could, by implying that there had been a violation, fulfil the same function. His approach had been to partition satisfaction so as to differentiate between its standard form, namely the acknowledgement of a breach by the State that committed it or a declaration by a tribunal, from its exceptional forms. In that regard, he opposed the suggested merger of paragraphs 2 and 3, which would blur that distinction.

235 As regards paragraph 3, he noted that the forms of satisfaction referred to were essentially exemplary and therefore symbolic, even if in some instances, such as in the *I'm Alone* case, a substantial sum had been awarded as satisfaction. The Commission, when adopting the

articles on first reading, had opted for dealing with such situations in the context of article 45, instead of article 44. In doing so it had limited the concept in an unsatisfactory manner, i.e. by rejecting the analogy between non-material damage to private individuals involving affront, *injuria* in the general sense, and *injuria* to States. One possible way of limiting the concerns as to the possible abuse of satisfaction would be to acknowledge that a form of non-material injury could also be compensated for in the context of article 44, by allowing for damages to the State for *injuria*. Article 45 would then be restricted to non-monetary and expressive elements of the resolution of disputes.

236. The Special Rapporteur indicated that retention of a non-exhaustive list of the main forms of satisfaction was useful. He had no particular preference as regards the retention in the draft articles of nominal damages. He also noted that the holding of an inquiry could also prove important by providing insight into what had actually occurred and could, in addition, lead to assurances and guarantees of non-repetition.

237. As to paragraph 3, subparagraph (c), he noted that the argument could be made that the contents of the subparagraph were already covered by the primary rules, and would not constitute a major function of satisfaction.

238. Concerning paragraph 4, he recalled that the majority of the Commission had agreed with the notion of proportionality, and emphasized that the main objective of paragraph 4 was to prevent excessive demands in relation to satisfaction.

239. With regard to article 45 *bis* on interest, while some members had felt that interest was part of compensation, the majority had expressed a preference for a separate article, even if interest was only an accessory to compensation. His own view was that the provisions on interest should not be included in the article on compensation since there were circumstances where interest could be payable on principal sums other than compensation, for example, on a sum that was payable by virtue of a primary rule.

240. In relation to article 46 *bis*, the Special Rapporteur observed that although the main objective of the article was to limit the amount of compensation, under certain circumstances it could have a different effect, for example, where a delay in filing a claim for payment could lead a tribunal to determine that there was no need to pay interest.

241. In relation to subparagraph (a), he noted that the majority of members had supported his formulation, which had closely followed the wording adopted on first reading, and which had been widely accepted by States. Yet some divergence of views had surfaced in the course of the

discussion between those who favoured more elaborate provisions and those who preferred more concise ones. It would be a matter for the Drafting Committee to seek to conciliate the different views.

13. Introduction by the Special Rapporteur of Part Two *bis* Implementation of State Responsibility

Chapter I. Invocation of the responsibility of a State

(a) General comments on Part Two *bis*

242. The Special Rapporteur recalled that the Commission had provisionally agreed to formulate Part Two in terms of the obligations of the responsible State, together with the inclusion of a new Part Two *bis* which would deal with the rights of the injured State to invoke responsibility. The Commission had also accepted the Special Rapporteur's distinction between the injured State *qua* State victim, and those States that had a legitimate concern in invoking responsibility even though they were not themselves specifically affected by the breach.

243. The second addendum to his report dealt with the invocation of responsibility by the injured State, namely the State which was the party to the bilateral obligation, or which was specially affected or necessarily affected by the breach of a multilateral obligation. This was without prejudice to the special provisions on the right of the further category of States, i.e. those falling into category 40 *bis*, paragraph 2, to invoke responsibility in a variety of ways, a matter that would be dealt with subsequently.

(b) The right to invoke the responsibility of a State (article 40 *bis*)

244. The Commission had earlier debated article 40 *bis*, although its location in the draft articles was still provisional. The Special Rapporteur subsequently proposed that the draft article be placed in Chapter I of Part Two *bis*. He stated that in the ordinary case the injured State could elect whether to insist on restitution or to receive compensation. He did not agree that the injured State could elect the form of satisfaction, i.e. the injured State could not absolutely insist on a specific form of satisfaction, though it was entitled to insist on some form of satisfaction. However, the injured State was entitled to decline restitution in favour of compensation. Yet, some exceptional limits on the right of the injured State to do so existed, as recognized in the notion of "valid" election. Those issues were generally dealt with in the context of the continuing performance of the primary obligation, rather than through any mechanism of election as between the forms of reparation.

(c) Invocation of responsibility by an injured State (article 46 *ter*)

245 The Special Rapporteur proposed article 46 *ter*[54] on formal requirements for the invocation of responsibility, based on the analogy of article 65 of the Vienna Convention on the Law of Treaties The first paragraph of the proposed draft article required notice of the claim, as a minimum requirement, since certain consequences arose from not giving notice of the claim over a long period of time, e g the State may be deemed to have waived the claim

246 As to the question of admissibility of claims, in paragraph 2, the Special Rapporteur observed that, notwithstanding that the details of the rules on nationality of claims and the exhaustion of local remedies rule would be covered in the topic on Diplomatic protection, those were conditions to the admissibility of the claim itself, and not questions of judicial admissibility which were beyond the scope of the draft articles on State responsibility As such they deserved a mention in the draft articles, and he proposed Chapter I of Part Two *bis*, as the more appropriate place

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[54] The text of article 46 *ter* proposed by the Special Rapporteur reads

Article 46 *ter*

Invocation of responsibility by an injured State

1 An injured State which seeks to invoke the responsibility of another State under these articles shall give notice of its claim to that State and should specify

(a) what conduct on the part of the responsible State is in its view required to ensure cessation of any continuing wrongful act, in accordance with article 36 *bis*,

(b) what form reparation should take

2 The responsibility of a State may not be invoked under paragraph (1) if

(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims,

(b) the claim is one to which the rule of exhaustion of local remedies applies, and any effective local remedies available to the person or entity on whose behalf the claim is brought have not been exhausted

(d) Loss of the right to invoke responsibility (article 46 *quater*)

247. The Special Rapporteur noted that the Vienna Convention on the Law of Treaties dealt with the loss of the right to invoke a ground for suspension and termination of a treaty. Since such issues were frequently raised in practice, it was appropriate to propose an analogous provision dealing with loss of the right to invoke responsibility, as article 46 *quarter*.[55] The following possible grounds for loss of the right to invoke responsibility existed: waiver, delay, settlement and termination or suspension of the obligation breached. The latter was important, as it were *a contrario*, because the termination or suspension of the obligation breached did not give rise to a loss of a right to invoke responsibility, as pointed out by arbitral tribunals in the modern period.

248. The proposed text recognized two grounds for the loss of the right to invoke responsibility, waiver, including by the conclusion of a settlement, and unreasonable delay. As to waiver, there was no doubt that in normal circumstances an injured State was competent to waive a claim of responsibility. This was a manifestation of the general principle of consent. It was not, however, feasible to codify the law of the modalities of the giving of consent by States. One case which could be assimilated to waiver was the unconditional acceptance of an offer of reparation (even partial reparation), in other words, settlement of the dispute. A second basis for loss of the right to invoke responsibility was undue delay; there was no set period or time limit for claims in international law, but the circumstances could be such that the responsible State reasonably believed the claim had been dropped, and this idea had been included in a separate paragraph.

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[55] The text of article 46 *quater* proposed by the Special Rapporteur reads:

Article 46 *quater*

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked under these articles if:

(a) the claim has been validly waived, whether by way of the unqualified acceptance of an offer of reparation, or in some other unequivocal manner;

(b) the claim is not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued.

(e) Plurality of injured States (article 46 *quinquies*)

249. The Special Rapporteur recalled that his second report had introduced the question of the plurality of States and the vexed question of the character of responsibility where there is more than one State involved, in the context of Chapter IV of Part One, and the general view had been that this should be addressed by the Commission in more detail. He noted the tendency for reliance on domestic law analogies with regard to the use of terminology. Examples included phrases like "joint and several responsibility" or "solidary" responsibility. Indeed, there were situations where phrases like "joint and several responsibility" or "joint and several liability" were incorporated in treaties, as in the case of the Convention on the International Liability for Damage Caused by Space Objects of 29 March 1972.[56] However, the problem was that such responsibility tended to be conceived of differently between different legal systems, and even within them in different fields such as contract and tort. Great caution was thus needed in resorting to the use of domestic law analogies in this area.

250. He proposed article 46 *quinquies* as a basis for discussion.[57] It was without prejudice to the situation where States parties to a particular regime had established a set of rules governing that regime, in the context of the activity of more than one State, entity or person. In the absence of a special arrangement, the situation was relatively simple: where there was more than one injured State, as narrowly defined in article 40 *bis*, paragraph 1, each injured State on its own account could invoke the responsibility of the responsible State.

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[56] United Nations, *Treaty Series*, vol. 961, p. 187.

[57] The text of article 46 *quinquies* proposed by the Special Rapporteur reads:

> Article 46 *quinquies*
>
> Plurality of injured States
>
> Where two or more States are injured by the same internationally wrongful act, each injured State may on its own account invoke the responsibility of the State which has committed the internationally wrongful act.

(f) Plurality of States responsible for the same internationally wrongful act (article 46 *sexies*)

251. The Special Rapporteur stated that article 46 *sexies*[58] dealt with the situation where more than one State was responsible for a particular harm, which was different from where a series of States had separately done damage to a particular State. A classic example was the *Corfu Channel* case, where mine laying was carried out by State A, on the territory of State B in circumstances where State B was responsible for the presence of the mines. The responsibility of State B in those particular circumstances did not preclude the responsibility of State A. Similarly, under Chapter IV of Part One, several States could be responsible at the same time for the same act causing the same damage.

252. The provision was qualified in two ways. First, paragraph 2 (a) provided for the rule against double recovery of damages as a limit on the recovery of reparation, which had been recognized by courts and tribunals. However, the situation in which it arose was largely the situation where the same claim, or at least the same damage, was the subject of complaint by the injured State against several States. While other situations could be envisaged, the draft articles could not deal with all of the procedural ramifications of situations of multiple responsibility. It was sufficient, therefore, that the rule against double recovery be mentioned in the context of the provision dealing with a plurality of responsible States.

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[58] The text of article 46 *sexies* proposed by the Special Rapporteur reads:

> Article 46 *sexies*
>
> Plurality of States responsible for the same internationally wrongful act
>
> 1. Where two or more States are responsible for the same internationally wrongful act, the responsibility of each State is to be determined in accordance with the present Draft articles in relation to the act of that State.
>
> 2. Paragraph 1:
>
> (a) does not permit any State, person or entity to recover by way of compensation more than the damage suffered;
>
> (b) is without prejudice to:
>
> (i) any rule as to the admissibility of proceedings before a court or tribunal;
>
> (ii) any requirement for contribution as between the responsible States.

253. Furthermore, two saving clauses on the question of admissibility of proceedings and the requirement of contribution between States were included in subparagraph (b). Concerning the former, the primary reference was to the *Monetary Gold* rule,[59] albeit that this was a purely judicial rule of procedure. As to the question of contribution, which was a matter to be resolved between States, the inference was that the injured State could recover in full for the injury caused to it by the act attributable to State A, even if the same act was attributable to State B as well, or if State B was responsible for it. Such principle followed from the decision in the *Corfu Channel* case, and was supported by general principles of law and considerations of fairness.

254. The Special Rapporteur recalled that he had also considered in his report the *non ultra petita* principle,[60] i.e. that a court may not give a State, in relation to an international claim, more than it asks for. While that principle had been widely recognized by the courts, it was really a manifestation of the underlying doctrine of election, and therefore required no specific recognition in the draft articles.

14. Summary of the debate on Part Two *bis*

Chapter I. Invocation of the responsibility of a State

(a) The right to invoke the responsibility of a State (article 40 *bis*)

255. In reference to the proposed placement of article 40 *bis* into Part Two *bis*, it was noted that Part Two would not retain any indication of which were the States to whom the obligations arising from international responsibility are owed. Likewise, Part Two *bis* also needed to be completed, because article 40 *bis*, as proposed by the Special Rapporteur, distinguished between injured States and those that had a legal interest, but it was necessary to specify what having a legal interest implied. While article 46 *ter* provided for the injured State invoking responsibility to choose the form of reparation, nothing was said about the latter category of States. Such States could, for example, request cessation and assurances and guarantees of non-repetition.

(b) Invocation of responsibility by an injured State (article 46 *ter*)

256. General support was expressed for the inclusion of an article on the forms for the invocation of responsibility, along the lines of that proposed by the Special Rapporteur.

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[59] *Case of Monetary Gold Removed from Rome in 1943 (Preliminary Question), I.C.J. Reports* 1954, p. 19.

[60] A/CN.4/507/Add.2, paras. 244-247.

257. As to the requirement of notice, contained in the chapeau to paragraph 1 of the Special Rapporteur's proposal, the view was expressed that the analogy to invoking the invalidity, suspension or termination of a treaty under article 65 of the Vienna Convention on the Law of Treaties was being stretched too far. There was no reason why a State should first make a protest or give notice of intentions to invoke responsibility.

258. Furthermore, support was expressed for the fact that the text did not require notice of the claim to be in writing. In that regard, the analogy to article 23 of the Vienna Convention was not appropriate. States do not always communicate in writing, and it was not always clear what different acts "in writing" would cover. Various forms of notification, from an unofficial or confidential reminder to a public statement or formal protest could be taken as suitable means of notification, depending on the circumstances. The example of the flexible approach taken in the *Phosphate Lands in Nauru* case[61] was cited. Hence, any proposal to require writing would not reflect existing practice or the standards adopted by the International Court of Justice. By contrast, some members suggested the substitution of "a written notification" for the word "notice". It was also proposed that the reference be rendered as "officially notify", or "notification". The Special Rapporteur pointed out, in response, that his proposal only referred to "notice" which was more flexible than "writing"; he agreed that much depended on the circumstances.

259. As to subparagraphs (a) and (b), it was suggested that the permissive "should" at the end of the chapeau to paragraph 1 be replaced by "shall", so as to make the requirements in those subparagraphs mandatory. Others however thought that the term "should" was a more accurate reflection of the legal situation. It was also proposed that subparagraphs (a) and (b) be deleted and reflected in the commentary.

260. According to some speakers, subparagraph 1 (a) created the impression that the injured State could decide on the required conduct, which was not the case. A responsible State would be entitled to object to a conduct other than that required by the breached rule. It was also suggested that the provision should be indicative and not restrictive, so as not to be limited to cessation.

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[61] *Case concerning Certain Phosphate Lands in Nauru, I.C.J. Reports* 1992, p. 240.

261. Regarding subparagraph 1 (b), the view was expressed that the right of an injured State to choose the form of reparation was not sufficiently clearly stated, since reference was made to the form and procedure in broad terms, and not to the object and content of the claim. The draft articles should make the right of election explicit: the injured State could demand restitution in accordance with article 43 each time it was possible and not disproportionate; the injured State could not yield restitution in cases of a violation of a peremptory norm of general international law, since the respect for the obligation was of interest to the whole international community; but in other cases there was nothing to prevent a State from waiving restitution or compensation for satisfaction. Another view was that article 1 (b) did clearly state the right of the injured State to choose what form reparation should take. Still others took the view that the "right" of the injured State to choose the form of reparation, was not absolute, particularly when restitution in kind is possible, otherwise the rule of the priority of restitution over compensation would have no meaning. In particular, it was doubted whether such right of election was to be construed as a subjective right of an injured State, to which a corresponding obligation on the part of the responsible State (to provide the form of reparation that had been "validly" elected by the injured State) existed. In practice, election was most frequently between restitution and compensation, on the basis of an agreement among the parties. Instead, the election of the form of reparation should be considered an "option" or "claim" open to the injured State, as distinct from an entitlement which the responsible State was bound to respect. In practice, the question of the election of the form of reparation would come at a later stage, after the initial contact with the respondent State, so that the issue should not be confused with the initial notification of the claim.

262. It was further noted that while the draft articles only regulated inter-State relations, such relations could be affected by the fact that individuals or entities other than States are the beneficiaries of reparation, i.e. that claims may be brought for their benefit. It was thus proposed that the possibility be recognized that individuals have some say in choice of the form of reparation.

263. Concerning paragraph 2, the suggestion was made to place it in a separate article, entitled "conditions for the exercise of diplomatic protection", since it was not clearly related to paragraph 1.

264. The concern was expressed that the reference in subparagraph 2 (a) to the nationality of claims rule could prejudge future work on the topic of diplomatic protection. Furthermore, the phrase "nationality of claims" was considered imprecise, and better reflected as the nationality of a person on whose behalf a claim was put forward by a State.

265. Again in regard to subparagraph 2 (b), it was pointed out that the inclusion of an article on the exhaustion of local remedies rule in the draft articles would limit the Commission's freedom of action in relation to the topic diplomatic protection. A preference was thus expressed for a more neutral formula, which could state that local remedies need to be exhausted in accordance with the applicable rules of international law. Such a neutral approach would also avoid prejudging the question of which approach to the exhaustion of local remedies rules, i.e. the substantive or procedural, should be favoured. Others thought that the Special Rapporteur's formulation seemed to favour the procedural theory, and that it was right to do so. Even so, it might be wiser to include in Part Four a general saving clause relating to the law of diplomatic protection.

266. In response, the Special Rapporteur recalled that the Commission had previously considered the question of the exhaustion of local remedies in the context of his second report,[62] and that it had concluded that the matter should be left open, because the appropriate approach (substantive or procedural) depended on the context. In cases where it was clear that there had already been a breach (e.g. torture) exhaustion of local remedies was a procedural prerequisite which could be waived; in other cases the denial of justice was the substance of the claim. There could also be cases in between. The formulation of article 46 was not intended to prejudice the matter. Furthermore, a specific reference in the draft articles was preferable, since it was at the very least arguable that the exhaustion of local remedies rule applied outside the field of diplomatic protection, e.g. to individual human rights claims under general international law. It was significant that the articles in the human rights treaties referred to the local remedies rule as being that applicable under general international law.

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[62] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), paras. 220-243.

267. As to the principle of *non ultra petita*, support was expressed for not including it in the draft articles, since courts have the right to define compensation above what is being demanded by the claimant in exceptional cases. Its inclusion could also limit the flexibility of international tribunals in deciding on the appropriate combination of remedies. Other members, however, felt that the principle was an integral part of positive law.

(c) Loss of the right to invoke responsibility (article 46 *quater*)

268. The view was expressed that the term "waiver" was being used in a too extensive sense. As such it was suggested that the broader term "acquiesence", be used instead. According to one view, the terms "unqualified" and "unequivocal" needed clarification. It was suggested that provision could also be made for partial renunciation of the right to invoke a particular form of reparation, i.e. that the election of remedies was a form of partial waiver. The view was also expressed that settlement could not be categorized as a kind of waiver but should be treated separately, because unilateral action by one State was not enough. Settlement had to be reached through the actions of both States. It was also doubted whether unqualified acceptance of an offer of reparation could be subsumed under the category of waiver.

269. The question was raised of what happened to the wrongful act and the duty of cessation and reparation if the right to invoke responsibility was lost. In that regard, it was suggested that the duty to make reparation remained in force, and that the wrongful act could only become legal if the waiver of the right to invoke responsibility amounted to consent *ex post*.

270. On delay and extinctive prescription, agreement was expressed with the Special Rapporteur's view that a lapse of time does not as such lead to the inadmissibility of a claim to reparation. It was doubted whether extinctive prescription was recognised in respect of all categories of claims under general international law. It was certainly not appropriate in the context of "crimes", which were recognized as imprescriptible. Similarly, the example was given of the difficulties of applying the concept of prescription in the context of States that had undergone a process of decolonization, where, in many cases, the evidence that would enable such States to invoke the responsibility of another State had not been made available to them on independence: such contextual factors had been taken into account by the Court in the *Phosphate Lands in Nauru* case. Likewise, the reference to a "reasonable time" was considered too vague. Others disagreed: that notion served a useful purpose, as it left it to the court to decide, on the merits of each claim, whether the delay in notification constituted grounds for loss

of the right to invoke responsibility. It was also doubted that the reference to the *La Grand* case[63] in the report was appropriate to demonstrate the loss of the right to invoke responsibility.

271. A preference was expressed for replacing the last phrase, "the responsible State could reasonably have believed that the claim would no longer be pursued", with a reference to how the claimant had behaved, since a reference to what the respondent party had believed could give rise to problems of proof. It was also suggested that the entire phrase was vague and subjective and could be deleted.

(d) Plurality of injured States (article 46 *quinquies*)

272. General support was expressed for the Special Rapporteur's proposal, and for the view that, contrary to the approach taken by the draft articles as adopted on first reading, contemporary international relations increasingly involves plurilateral relations, a fact which needed to be reflected in the draft articles.

273. However, the view was also expressed that the situation envisaged in the article 46 *quinquies* was too simplistic. The example was cited of multiple claims on behalf of individuals (non-nationals) under the European Human Rights system against a State party to the European Convention on Human Rights. Besides a claim brought by the individual in question, any other State party to the Convention could also bring an inter-State complaint. In addition, the State of nationality had the right to invoke the responsibility of the State in question for injury to its nationals under the general regime of responsibility. Furthermore, any other State would have the right to invoke responsibility in a restrictive sense if the violation was a gross violation of an *erga omnes* obligation. Hence, four different types of consequences to one and the same wrongful act could be envisaged. Similarly, the provision did not sufficiently take into account the involvement of international organizations in the actions of pluralities of States, and in particular the implications for States members of an organization with regard to their own responsibility, where they act in the context of an organization where responsibility is joint and several. The view was expressed that the wrongfulness of the conduct of States was not affected by the fact that they were acting in accordance with the decision of an international organization. It was also pointed out, however, that the question of the responsibility of international organizations was beyond the scope of the current draft articles.

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[63] *La Grand case, Request for the Indication of Provisional Measures, I.C.J. Reports* 1999, p. 9.

274. Differing views were expressed regarding the appropriateness of citing the Convention on the International Liability for Damage Caused by Space Objects, as an example. While it could serve as a practical example of the phenomenon of joint and several liability, in the view of some, the Convention was an isolated example, without any successor, and could not be taken as proof of a certain tendency in international law. Others thought that the reference to the Convention was entirely justified, and should have been expanded to cover article 6 of the Convention, which contained elements of liability and responsibility. Doubts were expressed regarding the usefulness of the example of European Union mixed agreements, which again were subject to a very specific regime. The Special Rapporteur noted that a function of the report was to set out relevant practice, whether convergent with the conclusions reached or not. He had himself argued that neither the regime of joint and several liability in the Space Objects Convention, nor that of the mixed agreements within the EU, reflected the general position under international law.

(e) Plurality of States responsible for the same internationally wrongful act (article 46 *sexies*)

275. While support was expressed for the proposed article, the view was expressed that paragraph 1 raised difficulties, since it was not always clear when there was the "same internationally wrongful act", and there was a plurality of States that committed that act. There may be a plurality of wrongful acts by different States contributing to the same damage. For example, in the *Corfu Channel* case, it was arguable that there actually were two wrongful acts, not one. Others thought the *Corfu Channel* case provided evidence that international law was moving towards the notion of joint and several responsibility. If the internationally wrongful act of several States had contributed to the same injury, then each of those States had to repair the damage done as a whole, and they could then turn against the other responsible States, as in the *Phosphate Lands in Nauru* case.

276. Concerning the subsidiary nature of domestic law analogies in the context of article 46 *sexies*, referred to in paragraph 275 of the report, it was noted that the general principles of law referred to in article 38 (1) (c) of the Statute of the International Court of Justice was based on domestic law analogies. Others noted that such analogies were of limited relevance in this area because of the divergences in national approach and terminology.

277. As to the drafting of paragraph 1, it was suggested that the emphasis be placed on consequences, and not on determining responsibility. The Special Rapporteur explained that in referring to the "responsibility" of each State, he had intended to incorporate by reference the whole of the text.

278. In regard to paragraph 2, preference was expressed for redrafting the provision, and placing it elsewhere in article 44 on compensation. As to subparagraph 2 (a), it was suggested that the rule against double recovery might apply not only to the case of plurality of responsible States, but also more generally; on the other hand no mention needed to be made of recovery by a "person or entity" other than the State, which was a matter more for the topic of diplomatic protection, it being understood that the State can be injured in the person of its nationals. In addition, a preference was expressed for making reference to reparation instead of compensation.

279. Different views were stated in relation to subparagraph (b) (i) on the question of a rule as to the admissibility of proceedings. While it was suggested that it be moved to the commentary since the draft articles need not concern themselves with the procedural aspects, support was also expressed for retaining the provision.

280. Regarding subparagraph (b) (ii), it was observed that the requirement for contribution was a common law notion not a civil law one. A preference was thus expressed for a more neutral formulation.

15. Special Rapporteur's concluding remarks on Chapter I

281. The Special Rapporteur noted the general agreement in the Commission that the draft articles should include a chapter on invocation of the responsibility of a State, as distinct from the chapters dealing with the immediate consequences of an internationally wrongful act.

282. In relation to article 46 *ter*, he had intended that the term "notice" be less formal than "notification". There had been a divergence of view as to how formal the notification should be, and as to whether it should be in writing or not. He tentatively favoured the view of the majority of the Commission that it should not be.

283. The more substantial question was that of the election as between the forms of reparation. The situation was clearly different where the question of reparation, including restitution, was implicated with the question of the continued performance of the obligation. It could be that the injured State was not alone competent to release the responsible State from the continued performance of the obligation. No doctrine of election could override that situation.

284. Thus the Commission was concerned only with a situation where restitution as to the past was at stake, and where no requirement of continued compliance arose. The question was whether, in those circumstances, the injured State could freely elect the form of reparation, or whether - where restitution was possible - the responsible State could insist on restitution rather than compensation. If the injured State had already suffered financially assessable loss, which had not been fully compensated by restitution, could the responsible State insist on restitution? He was not aware that that situation had ever arisen, and the problem was not an easy one to resolve in the abstract. While he had chosen the word "validly" in relation to waiver, it also applied, at least by implication, in relation to election under article 46 *ter*.

285. As to whether the articles should have entered into more detail, both on the validity of an election and on the problem where there was more than one injured State and disagreement between them, he thought not, partly because of the absence of guidance from State practice, and also because so much would depend on the particular circumstances and on the rules at stake. The inference to be drawn from Chapter II of Part Two was probably that, in circumstances where restitution was available, each injured State had a right to restitution. It could be that that right prevailed over an election by another injured State - at least if that election had the effect of denying the right. But that should be left to inference, in his view, since it was impossible to envisage the range of cases.

286. The Special Rapporteur agreed with the majority view that paragraph 2 of article 46 *ter* should be retained as a separate article. It raised the more general question of the relationship between the draft on State responsibility and the draft on diplomatic protection. Diplomatic protection was not separate from State responsibility; a State acting on behalf of one of its nationals was nonetheless invoking State responsibility. If the exhaustion of local remedies rule were omitted there would be very significant concern amongst governments, especially in view of its place in the articles adopted on first reading. Furthermore, the exhaustion of local remedies rule was applicable not only to diplomatic protection but also in the context of individual breaches of human rights, which did not form part of the law of diplomatic protection but did form part of the law of State responsibility. He therefore favoured a separate article incorporating the substance of paragraph 2, placed in Part Two *bis*, and without prejudice the debate between the substantive and procedural theories of the exhaustion of local remedies.

287. As to article 46 *quater* on the loss of the right to invoke responsibility, the Special Rapporteur noted that there had been general support for article 46 *quater* (a), despite

suggestions that the notion of settlement be treated as distinct from waiver. With regard to subparagraph (b), he noted the point had been raised that there was a distinction between a case of unconscionable delay amounting to laches or *mora*, and the case where a State's delay caused actual prejudice to the responsible State.

288. With regard to a plurality of injured States and of responsible States, the Special Rapporteur noted that the modest approach of the articles had attracted general support. No strong support had existed during the debate for a more categorical approach in favour of the doctrines of joint and several responsibility. As to the point that the *Corfu Channel* case could have been interpreted as involving two separate wrongful acts resulting in the same damage, another interpretation could be given, i.e. that two States had colluded in a single wrongful act. However, he suggested that the Drafting Committee consider the question of the application of article 46 *sexies* in situations where there were several wrongful acts each causing the same damage.

289. Concerning subparagraph 2 (a) of article 46 *sexies*, the Special Rapporteur opposed the suggested deletion of the reference to "person or entity". The situation clearly arose where the individual entity injured recovered, even in domestic proceeding or before some international tribunal. The principle of double recovery needed to be taken into account in such cases. On paragraph 2 (b), he agreed that subparagraph (i) was a rule of judicial admissibility and should not be included in the article. It could perhaps be the subject of a general savings clause in Part Four. The Special Rapporteur noted that there had been no disagreement regarding the substance of subparagraph (ii).

16. Introduction by the Special Rapporteur of Part Two *bis*: Implementation of State Responsibility (*continued*)

Chapter II. Countermeasures

(a) General comments on countermeasures

290. The Special Rapporteur pointed out that the third addendum to his report (A/CN.4/507) was concerned only with the narrower question of the taking of countermeasures by an injured State, as provisionally defined in paragraph 2 of article 40 *bis*, and that the further question of collective countermeasures was considered in his fourth addendum.[64]

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[64] See paras. 355-357.

291. He recalled that, while the draft articles adopted on first reading had made a linkage between the taking of countermeasures and dispute settlement, he had proceeded on the basis of the Commission's provisional agreement in 1999 to draft the substantive articles on countermeasures without any specific link to any new provisions for dispute settlement, and to leave questions of dispute settlement under the draft articles to be dealt with in light of the text as a whole.[65]

292. The proposed articles constituted a reconfiguration that sought to solve a number of conceptual and other difficulties while maintaining the substance of articles 47 to 50 adopted on first reading. Article 47 as adopted on first reading had been a hybrid in that it had purported to define countermeasures at the same time as trying to limit them, thereby creating problems. Article 48 created the problem of the relationship between the procedure of seeking reparation and the taking of countermeasures, which was the most controversial issue of the entire text, and which it had tried to solve by an unsatisfactorily formulated distinction between interim and other measures. Article 49 as adopted on first reading had been drafted as a double negative, and he proposed a stricter formulation in the light of the guidance given by the International Court of Justice in the *Gabčíkovo-Nagymaros* case. Article 50 had dealt with what were conceptually two different matters: the question which obligations could be suspended by way of the taking of countermeasures, and the question what effects countermeasures could not have in terms of, for example, a breach of human rights and a breach of the rights of third States.

293. The Special Rapporteur recalled that in 1999 he had proposed the inclusion of an article 30 *bis* dealing with a version of the exception of non-performance as a circumstance precluding wrongfulness.[66] At the time, the Commission agreed to postpone its consideration of the draft article until its precise formulation and need could be assessed in light of the articles on countermeasures to be considered in 2000. For the reasons explained in paragraphs 363 to 366 of his third report, he no longer proposed the inclusion of the provision in the draft articles.

(b) Countermeasures as a circumstance precluding wrongfulness (article 30)

294. The Special Rapporteur pointed out that the Commission had at its 1999 session decided to retain an article on countermeasures in Chapter V of Part One, as a circumstance precluding

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[65] *General Assembly Official Records, Fifty-fourth session, Supplement No. 10* (A/54/10), paras. 426-453.

[66] Ibid., paras. 334-347.

wrongfulness, but deferred finalizing the text of the article until its consideration of countermeasures in Chapter III of Part Two, as adopted on first reading.[67] During the current session, the Special Rapporteur proposed a new, simpler, formulation for article 30.[68]

(c) Purpose and content of countermeasures (article 47)

295. The Special Rapporteur pointed to a fundamental distinction between the suspension of an obligation and the suspension of its performance. The Vienna Convention on the Law of Treaties dealt with the suspension of treaty obligations, but did not stipulate how such obligations were to be re-instituted. Partly to avoid confusion with the suspension of treaties, the draft articles adopted on first reading had not used the word "suspension". Instead, article 47 had simply said that countermeasures occurred when a State did not comply with its obligations. But that approach was problematic, since a State "not complying with its obligations" covered all types of scenarios, including some which could be irreparable and permanent.

296. In the Special Rapporteur's view, the basic concept of a countermeasure was that it should be the suspension by the injured State of the performance of an obligation towards the responsible State with the intention of inducing the latter to comply with its obligations of cessation and reparation. This basic concept was incorporated into his proposal for article 47,[69] and was subject to the limitations specified in the other articles in Chapter II.

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[67] Ibid., paras. 332-333, and 426-453.

[68] The text of article 30 proposed by the Special Rapporteur reads:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [47]-[50 *bis*].

A/CN.4/507/Add.3, para. 362.

[69] The text of article 47 proposed by the Special Rapporteur reads:

> Article 47
>
> Purpose and content of countermeasures
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> 1. Subject to the following articles, an injured State may take countermeasures against a State which is responsible for an internationally wrongful act in order to induce it to comply with its obligations under Part Two, as long as it has not complied with those obligations and as necessary in the light of its response to the call that it do so.

297. The Special Rapporteur stressed that the countermeasures that could be taken were not reciprocal countermeasures, in the sense of that concept as used by former Special Rapporteur Riphagen,[70] where reciprocal countermeasures were taken in relation to the same or related obligation. The question was whether the notion of reciprocal countermeasures should be introduced either exclusively or at least in part as the basis for a distinction in the field of countermeasures. The Special Rapporteur agreed with the rejection of that distinction by the Commission on first reading. Limiting countermeasures to the taking of reciprocal countermeasures would create a situation in which the more heinous the conduct of the responsible State, the less likely countermeasures were to be available, because the more heinous the conduct the more likely it was to infringe, for example, human rights obligations. The old maxim of "a tooth for a tooth" was not a basis for countermeasures in the modern world.

298. A further important element missing from the draft articles adopted on first reading had been the question of reversion to a situation of legality if the countermeasures had their effect and a settlement was reached. The Special Rapporteur proposed to deal with that question through the notion of suspension of the performance of an obligation, and not suspension of the obligation itself, contained in paragraph 2 to his proposal for article 47. The obligation remained in force, and there was no situation of its being in abeyance. The obligation was there as something by reference to which the countermeasures could be assessed. He noted that the International Court of Justice in the *Gabčikovo-Nagymaros* case had identified reversibility as a substantial element of the notion of countermeasures. He agreed with this idea as a matter of principle the question was how to implement it, given that while they were in force, countermeasures would have adverse effects on the responsible State which no one suggested should be reversed retrospectively.

> 2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking those measures towards the responsible State.

A/CN.4/507/Add.3, para. 367. For the analysis of this article by the Special Rapporteur, see ibid., paras. 293-297, 321-333.

[70] *Yearbook ... 1985*, vol. II, Part One, p. 10 (art. 8).

(d) Obligations not subject to countermeasures and prohibited countermeasures (articles 47 *bis* and 50)

299. The Special Rapporteur suggested that the content of article 50, as adopted on first reading, be split into two provisions. His proposed draft articles thus distinguished between obligations the performance of which could not be suspended as countermeasures in the first place (art. 47 *bis*),[71] and obligations that could not be infringed in the course of taking countermeasures (art. 50).[72] It was an important distinction when considered from the point of

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[71] The text of article 47 *bis* proposed by the Special Rapporteur reads:

Article 47 *bis*

Obligations not subject to countermeasures

The following obligations may not be suspended by way of countermeasures:

(a) the obligations as to the threat or use of force embodied in the Charter of the United Nations;

(b) obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents;

(c) any obligation concerning the third party settlement of disputes;

(d) obligations of a humanitarian character precluding any form of reprisals against persons protected thereby; or

(e) any other obligations under peremptory norms of general international law.

A/CN.4/507/Add.3, para. 367. For the analysis of this article by the Special Rapporteur, see ibid., paras. 334-343.

[72] The text of article 50 proposed by the Special Rapporteur reads:

Article 50

Prohibited countermeasures

Countermeasures must not:

(a) endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State;

of view of the impact of countermeasures on human rights. Human rights obligations could not be suspended by way of countermeasures, since such measures were, by definition, taken against a State and not individuals. Problems nevertheless arose with regard to the possible effect of countermeasures on human rights obligations, a matter dealt with in article 50.

300. Paragraph (a) of article 47 *bis* made it clear that countermeasures did not deal with forcible reprisals, belligerent reprisals or the use of force. As to paragraph (b), on diplomatic and consular immunity, there had been little criticism of the first reading equivalent of the provision, which had been generally endorsed by Governments in their comments. Paragraph (c), pertaining to obligations concerning the third party settlement of disputes, had been implied in article 48 adopted on first reading. It was obvious that a State could not suspend an obligation concerning the peaceful settlement of disputes by way of countermeasures. Article 50, adopted on first reading, had also dealt with human rights, stipulating that they could not be subject to the taking of countermeasures. However, it was clear from the definition of countermeasures in article 47 that human rights obligations themselves could not be suspended. Instead, the Special Rapporteur proposed paragraph (d), which concerned the separate and narrower point relating to humanitarian reprisals. Paragraph (e) had been retained in article 47 *bis* since the performance of obligations under peremptory norms of general international law could not be suspended under any circumstances other than as provided for in those obligations.

301. As regards article 50, the Special Rapporteur recalled that the reference in paragraph (b), as adopted on first reading, to extreme economic or political coercion designed to endanger the territorial integrity or political independence of the responsible State, had attracted much criticism. Instead, he proposed a simpler formulation, as paragraph (a), which stipulated that countermeasures could not endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State.

302. The Special Rapporteur also noted that, even if lawful under the draft articles, countermeasures could not impair the rights of third parties. If third parties had a right as against

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(b) impair the rights of third parties, in particular basic human rights.

A/CN.4/507/Add.3, para. 367. For the analysis of this article by the Special Rapporteur, see ibid., paras. 311-319, 347-354.

the injured State, then the injured State was responsible to them for any breach of that right. Third parties included human beings, the addressees of basic human rights, so human rights were also covered by the new paragraph (b).

(e) Conditions relating to the resort to countermeasures (article 48)

303. The Special Rapporteur observed that, before a State took countermeasures, it should first invoke the responsibility of the responsible State by calling on it to comply: so much was agreed. In his proposal for article 48,[73] paragraph 1 reflected the basic obligation to make the demand on the responsible State. But in addition provision was made in paragraph 2 for the taking of provisional measures where necessary to preserve the injured State's rights. Article 48 avoided the "interim measures of protection" formula, which used the language of judicial procedure, in favour of the notion of the provisional implementation of countermeasures.

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[73] The text of article 48 proposed by the Special Rapporteur reads:

Article 48

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) submit a reasoned request to the responsible State, calling on it to fulfil its obligations;

(b) notify that State of the countermeasures it intends to take;

(c) agree to negotiate in good faith with that State.

2. The injured State may, as from the date of the notification, implement provisionally such countermeasures as may be necessary to preserve its rights under this Chapter.

3. If the negotiations do not lead to a resolution of the dispute within a reasonable time, the injured State acting in accordance with this Chapter may take the countermeasures in question.

4. A State taking countermeasures shall fulfil its obligations in relation to dispute settlement under any dispute settlement procedure in force between it and the responsible State.

A/CN.4/507/Add.3, para. 367. For the analysis of this article by the Special Rapporteur, see ibid., paras. 298-305, 355-360.

Paragraph 3 included the further requirement that, if the negotiations did not lead to a resolution of the dispute within a reasonable time, the injured State could take full-scale countermeasures.

304. In the event the Commission decided against drawing a distinction between "provisional" and other countermeasures, the Special Rapporteur proposed an alternative provision that would replace paragraphs 1 to 3 of article 48.[74]

(f) Proportionality (article 49)

305. The Special Rapporteur stated that the proposed new formulation of article 49 sought to highlight the fact that proportionality was a *sine qua non* for legality.[75] The wording was thus meant to address some of the concerns expressed by States on the decisive role which proportionality should have. His proposal was based on the formulation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case.

(g) Suspension and termination of countermeasures (article 50 *bis*)

306. The Special Rapporteur recalled that article 48, as adopted on first reading, had provided for the possibility of the suspension of countermeasures once the internationally wrongful act had ceased and a binding dispute settlement procedure had been commenced. The first reading text had not mentioned the question of termination of countermeasures, and that several States had suggested the inclusion of such a provision. The International Court of Justice had indirectly

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[74] The text of the alternative formulation of paragraphs (1)-(3) of article 48 proposed by the Special Rapporteur reads:

> 1. Before countermeasures are taken, the responsible State must have been called on to comply with its obligations, in accordance with article 46 *ter*, and have failed or refused to do so.

A/CN.4/507/Add.3, fn. 717.

[75] The text of article 49 proposed by the Special Rapporteur reads:

> Article 49
>
> Proportionality
>
> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effects on the injured party.

A/CN.4/507/Add.3, para. 367. For the analysis of this article by the Special Rapporteur, see ibid., paras. 306-310, 346.

referred to the matter in the *Gabčikovo-Nagymaros* case, albeit from the viewpoint of the reversibility of countermeasures. He thus proposed article 50 *bis*,[76] which covered both the question of the suspension of countermeasures (paras. 1 and 2), and their termination (para. 3). As to suspension in paragraph 1, he retained the approach of the first reading text, which had been supported by States and which was based, in part, on the remarks of the Tribunal in the *Air Services Agreement*.[77]

17. Summary of the debate on Part Two *bis* (*continued*)

Chapter II. Countermeasures

(a) General comments on countermeasures

307. Support was expressed in the Commission for the draft articles proposed by the Special Rapporteur which were considered by some to be an improvement to those adopted on first reading, and were described as displaying a fair balance between the interests of injured States and those responsible for wrongful acts.

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[76] The text of article 50 *bis* proposed by the Special Rapporteur reads:

Article 50 *bis*

Suspension and termination of countermeasures

1. Countermeasures must be suspended if:

(a) the internationally wrongful act has ceased, and

(b) the dispute is submitted to a tribunal or other body which has the authority to issue orders or make decisions binding on the parties.

2. Notwithstanding paragraph 1, countermeasures in accordance with this Chapter may be resumed if the responsible State fails to honour a request or order emanating from the tribunal or body, or otherwise fails to implement the dispute settlement procedure in good faith.

3. Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

A/CN.4/507/Add.3, para. 367. For the analysis of this article by the Special Rapporteur, see ibid., paras. 300, 305, 359 and 361.

[77] UNRIAA, vol. 18, p. 417 (1978).

308. The provisions were also welcomed by some as an indication that countermeasures were a fact, which resulted from the international system which lacked the means for law enforcement found in domestic systems. Furthermore, customary international law recognized the lawfulness of countermeasures in certain circumstances, as a measure of last resort, and within the limits of necessity and proportionality. Indeed, it was recognized that the proliferation of legal rules in the international system had increased the likelihood of violation of international obligations, and therefore increased the likelihood of resort to countermeasures as a form of redress. The elaboration of a balanced regime of countermeasures was therefore more likely to be of use in controlling excesses than silence. At the same time a preference was expressed for drafting countermeasures in a negative sense, so as to emphasize their exceptional nature.

309. Several members continued to register their opposition to countermeasures and to their regulation in the text. It was argued that the inclusion of countermeasures limited the acceptability of the draft articles, especially in the view of smaller States that might suffer the consequences of the abuse of countermeasures by powerful States, although it was recognized that smaller countries did, as between themselves, also resort to countermeasures on occasion. It was also stated that there was not a sufficient basis in customary law for countermeasures. In addition, countermeasures were frequently not reversible as to their effects. If the Commission preferred to include the issue of countermeasures, the respective provisions needed to be of a general nature and brief.

310. Furthermore, recourse to countermeasures and the notions of interim countermeasures and proportionality were all sources of possible disagreement between the State that considered itself injured and the *allegedly* responsible State - responsibility being something that still remained to be determined. The reputedly injured State could not resolve the disagreement unilaterally. Resolution could thus be achieved only through the machinery for peaceful settlement of disputes. Hence, several members expressed a preference for a return to the linkage of countermeasures with dispute settlement, as proposed in the draft articles adopted on first reading, which would give countermeasures a more certain footing under international law. It was suggested that account should be taken of situations where there was no dispute settlement procedure between the States concerned.

311. Still others maintained that delinking countermeasures from dispute settlement was acceptable in light of the fact that the possible final outcome of the Commission's work was a

flexible instrument - a declaration by the General Assembly - and because there was a growing number of particular regimes that sought to regulate the means by which to induce States to return to a situation of legality.

312. For his part, the Special Rapporteur was of the view that it would not be possible to establish an automatic link between the taking of countermeasures and dispute settlement, but that the articles should fit into existing and developing systems of dispute settlement, so that a State which was credibly alleged to have committed a breach of international law would be in a position to prevent any countermeasures by stopping or suspending the allegedly wrongful act and submitting the case to any available judicial procedure.

313. Numerous drafting suggestions were made, including reducing the provisions in number and including a legal definition of countermeasures. It was suggested that the draft articles explicitly distinguish between such closely related concepts as countermeasures, reprisals, retortion and sanctions. Other members proposed the express inclusion of the notions of reciprocal countermeasures and reversibility. According to some members, countermeasures were more suitable in relation to international delicts as opposed to breaches constituting international crimes; others took the contrary position.

314. There was general agreement with the Special Rapporteur's decision to withdraw his proposal, made in 1999, to include an article 30 *bis* in Chapter V of Part One, relating to non-compliance caused by prior non-compliance by another State, as a circumstance precluding wrongfulness.

(b) Countermeasures as a circumstance precluding wrongfulness (article 30)

315. General support was expressed for the inclusion of an article 30 in Chapter V of Part One recognizing the taking of lawful countermeasures as a circumstance precluding wrongfulness, based on the recognition of such a possibility by the International Court of Justice in the *Gabčikovo-Nagymaros Project* case and by the Tribunal in the *Air Services Agreement*. To the contrary, it was suggested that, in light of articles 47 *bis* and 50 *bis*, article 30 might not be necessary. In addition, it was felt that in reality the circumstance precluding wrongfulness was not the countermeasure itself, but the internationally wrongful act to which it responded.

(c) Purpose and content of countermeasures (article 47)

316. While support was expressed for the Special Rapporteur's proposal for article 47, several suggestions, mostly of a drafting nature, were made. For example, it was proposed that

provision be made for the situations of breach of an obligation towards a third State, as had been provided for in paragraph 3 of the text adopted on first reading. Others thought this unnecessary, since by their very definition countermeasures were taken towards a defaulting State, and their preclusive effect was limited to that State. This could be made clear in the drafting of articles 30 and 47, but a separate article dealing with third parties was unnecessary and even confusing.

317. There was for the most part agreement with the Special Rapporteur's rejection of reciprocal countermeasures, since, in practice, it was virtually impossible for countermeasures to respond substantially to the obligation that had been breached. But there was support for including an express reference to the principle of reversibility in the text.

318. There was criticism of any language which implied that countermeasures were a positive or "subjective" right of the injured State. Accordingly, paragraph 1 could be redrafted in a negative or a more neutral formulation along the lines of "[a]n injured State may not take countermeasures unless", or alternatively along the lines of the text adopted on first reading. It was also proposed that the latter part of paragraph 1 either be deleted or redrafted more clearly so as, for example, to limit countermeasures to those strictly necessary under the circumstances. In no case could countermeasures be of a punitive nature. It was also considered advisable that before taking any countermeasures, it had to be absolutely certain that an internationally wrongful act had indeed occurred.

319. As regards paragraph 2, a preference was expressed for its deletion since it could lead to interpretative problems in practice, and because the question of suspension of performance had been deliberately left out by the Commission during the first reading. In that regard, the reference to the *Gabčíkovo-Nagymaros* case in support of the retention of the notion of suspension was considered inappropriate. Others suggested that the reference to suspension of performance was acceptable since it covered both the removal of a prohibition as well as the suspension of an affirmative obligation.

(d) Obligations not subject to countermeasures and prohibited countermeasures (articles 47 *bis* and 50)

320. A majority of the Commission did not support the Special Rapporteur's proposal to split the original article 50 into two separate articles, and preferred either returning to a sole article on prohibited countermeasures or incorporating its content into article 48. Alternatively, it was suggested that, if the distinction were to be kept, article 47 *bis* would have to be placed immediately before article 50.

321. While support was expressed for article 47 *bis*, a preference was also voiced for a more general formulation instead of an enumerative listing of prohibited countermeasures. Alternatively, the list in 47 *bis* could be simplified or shortened, by means of a single reference to peremptory norms of general international law, since most if not all of the exceptions concerned peremptory norms. It was further suggested that a general rule be incorporated confirming that countermeasures were prohibited when the obligation that would be breached affected the international community as a whole. In response, the Special Rapporteur suggested the alternative of stating that countermeasures could only affect obligations in force between the responsible State and the injured State.

322. In relation to paragraph (a), the view was expressed that the prohibition on the threat or use of force should have been formulated in the form of a prohibition.

323. On paragraph (c), it was queried how an obligation concerning third party settlement of disputes could, in practice, be suspended by way of countermeasures. The failure of a party to appear before a compulsory dispute settlement procedure would not of itself halt the proceedings. Furthermore, it was maintained that the responsible State should as a general rule be allowed sufficient opportunity to make redress, particularly in cases where a treaty, containing the obligation in question, provided mechanisms for ensuring implementation or settlement of disputes. If such mechanisms proved inadequate, an injured State could justifiably resort to countermeasures on the basis of customary international law. It was also suggested that specific provision could be made for the situation in which a treaty explicitly prohibited the taking of countermeasures, as had been done in article 33 which expressly allowed for the situation where a treaty provision could exclude resort to the defence of state of necessity.

324. It was suggested that paragraph (d) be reformulated along the lines of the provision as adopted on first reading, or that an additional paragraph be inserted excluding reprisals in the context of human rights. It was also queried whether paragraph (e) should be retained, since it was implicit in the notion of peremptory norms that no departure was permitted.

325. Concerning article 50, the proposed title could be amended to make it clear that it dealt with the effect of countermeasures. As to paragraph (a), concern was expressed regarding the use of the word "intervention", since it was difficult to define in practice. Some preferred to return to the first reading formulation of article 50 (b), i.e. "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act", which reflected language commonly

used in General Assembly resolutions, and contained a principle important to developing States. Others agreed with the Special Rapporteur's approach of not making reference to "political independence of the State", since that was implicit in "territorial integrity". A further view was that the reference to "domestic jurisdiction of States" was not in line with developments in international law, where limits had been placed on the rule in article 2 (7) of the United Nations Charter. This opinion was contested by some other members.

326. In relation to paragraph (b), support was expressed for the Special Rapporteur's view that human rights obligations could not be subject to countermeasures. Concern was also expressed regarding the reference to basic human rights in the context of the expression "third parties", which was only applicable to States or other subjects of international law. Hence, it was suggested that human rights might better constitute the object of a separate provision. It was also pointed out that most countermeasures would have some impact on some human rights particularly in the social and economic field. Concerns were further expressed regarding the reference to "basic" human rights, and the possible divergence in interpretation that may arise in practice. It was also doubted whether every human rights violation implied a prohibition on equivalent countermeasures, or whether a distinction had to be drawn between different categories of rights. Support was expressed for an additional clause on prohibiting countermeasures that endanger the environment.

327. In response, the Special Rapporteur stressed that the analysis of human rights obligations was difficult in the case of countermeasures. A countermeasure which, per se, was lawful might constitute a violation of human rights if sustained over a long period of time, for example, a commercial embargo. The law on countermeasures needed to be coordinated with existing international human rights law. Therefore, he proposed that the effects of human rights be reserved, in a single article combining articles 47 *bis* and 50, without deciding whether some are basic or not, since the content of the rights themselves would determine the permissibility of countermeasures.

(e) Conditions relating to the resort to countermeasures (article 48)

328. As to paragraph 1, subparagraph (a), of article 48, it was noted that, in principle, countermeasures must be preceded by a demand by the injured State, which the responsible State had failed to meet. Such demand had to be so decisively expressed as to leave the responsible State with no doubt as to the seriousness of the implications involved. Concerning subparagraph (b), the view was expressed that notification of countermeasures before

negotiations had taken place was premature. Furthermore, the subparagraph could be deleted since it might be counterproductive to inform the responsible State of the exact countermeasures that were to be taken. It was also suggested that the article be redrafted so that an offer to negotiate formed part of the process of giving notice. In relation to subparagraph (c) it was suggested that the word "agree" be replaced with "propose" or "offer". Furthermore, it was suggested that while the proposed article had rightly attached importance to the good faith of the responsible State, it had neglected the good faith of the injured State. If the responsible State accepted the offer of negotiations, or it agreed to the dispute being settled by a judicial or arbitral tribunal, the injured State could not be allowed to resort unilaterally to countermeasures.

329. With regard to paragraph 2, it was suggested that the distinction between "provisional" and other countermeasures be abolished, since, in the absence of a legal framework for "provisional countermeasures", such measures in fact and in practice encompassed all the elements of full-scale countermeasures. Rather the exceptional character of countermeasures of any kind should be stressed.

330. Concerning paragraph 3, the appropriateness of using the word "dispute" was questioned. Likewise, the reference to a "reasonable time" was considered too vague. Others thought the term offered injured States a satisfactory safeguard against protracted and fruitless negotiations.

331. Some support was expressed for the shortened draft presented by the Special Rapporteur as an alternative to paragraphs (1) to (3).[78]

332. With regard to paragraph 4, the view was expressed that the notion of good faith required that a State which had entered into an obligation to arbitrate disputes or seek a judicial settlement, could not subvert it by acts that were otherwise illegal. Furthermore, where the States involved belong to an institutionalized framework which prescribed peaceful settlement procedures, the exhaustion of those procedures would be a prerequisite to the taking of countermeasures. In addition, it was suggested that paragraph 4 be strengthened to reflect the need to submit disputes to available dispute settlement procedures prior to the taking of countermeasures, so as to strike a proper balance by including a reference to third-party dispute settlement in the draft while finding a practical method of separating countermeasures and dispute settlement.

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[78] See note 74 above.

(f) Proportionality (article 49)

333. While general support was expressed for the new formulation of article 49 suggested by the Special Rapporteur, which was described as being simpler and clearer than that adopted on first reading, others thought the proposed wording merited further consideration. Lawfulness could not be guaranteed by such a provision since the injured State itself was effectively authorized to gauge the proportionality of its countermeasures. A more precise formulation of the proportionality requirement was necessary.

334. It was further stated as to the idea of a balance with the injury suffered or the gravity of the wrongful act, that countermeasures were tolerated to induce the wrongdoer to comply with its obligations, not by way of punishment or sanction. Thus, proportionality was concerned only with the degree of the measures necessary to induce compliance. The reference to the gravity of the internationally wrongful act and its effects on the injured party, added nothing of legal relevance.

(g) Suspension and termination of countermeasures (article 50 *bis*)

335. General support was expressed for the inclusion of article 50 *bis*, as proposed by the Special Rapporteur.

336. In relation to paragraph 1, a preference was expressed for referring to "terminated" as opposed to "suspended". It was queried whether subparagraph (b) applied equally to the decisions of the Security Council and the orders of the International Court of Justice. The Special Rapporteur indicated that Security Council decisions were not intended to be covered by the article. It was also pointed out that there was no reason why the submission of a dispute to a tribunal should automatically suspend countermeasures, when the submission of the same dispute to a tribunal at an earlier stage, as contemplated under article 48, did not automatically prevent their being taken in the first place. Furthermore, the provision required automatic suspension of countermeasures, even where a tribunal authorized to issue a suspension order did not do so.

337. As to paragraph 2, it was noted that the unqualified reference to "an order" from an international tribunal could give rise to the interpretation that even procedural orders were included, which should not be the case. It was thus proposed that the provision be qualified with a phrase such as "on the substance" or "on the merits of the case". Alternatively, it was suggested that paragraph 2 be deleted.

18. Special Rapporteur's concluding remarks on Chapter II

338. The Special Rapporteur recalled that most States had, either reluctantly or definitively, accepted the elaboration of provisions on countermeasures. In spite of the reluctance with which countermeasures might be contemplated, he agreed with those who felt that it was preferable to have some regulation rather than none, since countermeasures constituted a fact of life. Furthermore, the Commission needed to draw a clear distinction between the general question of the position taken by the draft on dispute settlement and the specific connection between dispute settlement and countermeasures. The general question depended on the form that the draft would ultimately take. Until that decision was made, article 48 contained as close a connection between countermeasures and dispute settlement as was possible without introducing new forms of dispute settlement into the text.

339. With regard to article 30, the Special Rapporteur indicated that the general view had been favourable to its retention in a simplified form.

340. The Special Rapporteur acknowledged that his attempt to make a distinction between articles 47 *bis* and 50 had failed and that the contents of these articles should therefore be merged.

341. As regards article 47, the Special Rapporteur agreed that a clarification to stipulate that countermeasures might not be taken unless certain conditions were met would be helpful and thus leave any illegal effect to be regulated by article 30.

342. In relation to articles 47 and 47 *bis*, two questions had been raised: the first concerned the question of reversibility and the second that of the bilaterality of the suspended obligations. In the view of the Special Rapporteur, the Commission could even proceed to state that countermeasures must be reversible and must relate to obligations only as between the injured State and the target State.

343. As regards article 48, the Special Rapporteur noted that the text he had proposed constituted a reasonable compromise between the two opposing positions that preferred either a simple provision or the non-recourse to countermeasures until negotiations had been exhausted. He agreed with the suggested deletion of article 48, paragraph 1 (b).

344. As regards article 49, the debate in the Commission had also reflected a general agreement on the inclusion in the draft articles of a reference to the need to be both proportionate and commensurate to the injury caused by the wrongful act, though the precise way to reflect them therein was subject to further consideration.

345. The Commission had generally endorsed article 50 *bis* and the Special Rapporteur was of the view that the provision should be retained irrespective of whatever decision might be made regarding article 48.

19. Introduction by the Special Rapporteur of the invocation of responsibility to a group of States or to the international community

(a) General considerations

346. The Special Rapporteur pointed out that the fourth addendum to his report dealt with issues previously considered by the Commission during the current quinquennium, both in the context of the examination of article 19, as adopted on first reading, in his first report and of the debate on article 40 *bis* during the current session.

347. The first reading text had moved beyond codification by including the controversial concept of State "crimes" in article 19, but had not developed that idea in any significant way. It had also implicitly established a regime of countermeasures in respect of not-directly injured States, by a combination of articles 40 and 47, which was far too broad, for example, by giving third States the right to take countermeasures in respect of any breach of human rights whatever.

348. The Special Rapporteur recalled the Commission's 1998 debate on article 19, and its provisional decision to address the issue in the following way: "... it was noted that no consensus existed on the issue of the treatment of 'crimes' and 'delicts' in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19 ...".[79] Progress had been made along the lines suggested in 1998, particularly through the disaggregation of the concept of international crime in various aspects of the draft articles, for example, by reconsidering article 40 and introducing into the draft articles, in a much more systematic manner, the notions of obligations owed to the international community as a whole,

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[79] *General Assembly Official Records, Fifty-third session, Supplement No. 10* (A/54/10), para. 331.

as well as the notion of peremptory norms. The fourth addendum to his report focused on outstanding issues, and had to be considered in light of all the work that had preceded it.

349. It had to be recognized that the primary means of addressing the problems referred to in article 19 was not the law of State responsibility. Faced with major catastrophes arising from wrongful conduct, such as genocide or invasion of a State, it could not be argued that the rules of State responsibility by themselves were sufficient to resolve those problems without any organizational response or coordinated action by the international community. The reference to "crime" in article 19, was historically a reference to the conduct of governments which were unaccountable to their people, acting for their own ends, and often with their population as the primary or ancillary victims of their action. The idea that the entire population should be victimized in that situation was difficult to accept. Care had to be taken with the notion that the pronouncement of criminal conduct was by itself a sufficient response to those problems.

350. It was also significant that the international community had begun to adopt more rigorous methods of dealing with individuals responsible for those crimes, in particular through the Rome Statute on the International Criminal Court of 1998. The way forward could be to hold those individuals accountable for their acts, rather than holding the victimized population accountable through some concept of crime of State. It was not that the State was not responsible for their acts. Under classical rules of attribution, the State was responsible for such acts. Indeed, article 19 operated on the same principle of attribution as any other internationally wrongful act. However, if article 19 was concerned with "crimes" proper, it would have had its own rules of attribution, as in any criminal code.

351. As to the question of the right of every State to invoke the responsibility for breaches of obligations to the international community as a whole, the Commission had accepted that possibility, in principle, as a result of its discussion on his earlier proposals relating to article 40 *bis*. While such right had to be clearly spelled out in the draft articles, the question was how far it should extend. In his view, it clearly extended to cessation, i.e. all States were to be regarded as having a legal interest in the cessation of breaches of obligations to the international community; and as a corollary all States were entitled to that aspect of satisfaction that amounted to declaratory relief, even if they had no individual entitlement to the other forms of satisfaction. Furthermore, in his view, such States would at least be able to seek restitution on behalf of the victims of crimes.

352. Limitations had to be imposed on such a right, given that other considerations had to be taken into account. For example, it could become chaotic if a number of States began demanding different things under the rubric of State responsibility. In his view, three separate scenarios were discernable. First, in the context of the breach of an obligation to the international community as a whole, the primary victim might be a State, for example, a State which was the target of aggression. In that situation the victim State should control the responses by way of State responsibility, i.e. third States' responses should be secondary both within the context of countermeasures and of the invocation of responsibility. Such third States could demand cessation, but once the conduct had ceased, questions of the resolution of the dispute were in the first place a matter for the victim State to resolve. Second, where there was no injured State in respect of such a breach, for example, in the context of where the population of, or a particular group within, the responsible State was the victim, such as in the situation of Cambodia. There was no State on whose behalf the international community would be responding. The notion that this was merely a deficiency in the State system, hence beyond the scope of State responsibility, was too narrow. The international community had to be able to intervene in that case, irrespective of the views of the responsible State, and seek cessation, a minimum element of satisfaction and restitution. The third situation was where no one was identifiably the victim of the breach. Examples included obligations in relation to the environment owed to the international community as a whole, where the whole of humanity was affected in the long term, but nobody was specifically affected by it, as in the case of global warming. In that situation, State members of the international community should be able at least to seek cessation.

353. Furthermore, if there were to be a regime of crimes in the international system, that should involve, as a minimum, notions of penalty. It might also involve other features of criminal systems, that were unenvisagable in the present international system. In regard to the question of penalty, the Special Rapporteur pointed to the recent example of a State being "fined" by an international tribunal, the European Court of Justice. It was, however, the first experience of the European Union in that field, and it remained to be seen how it would develop. It did, however, demonstrate what was necessary to have a proper system of penalties, i.e. due process, compulsory jurisdiction, and proper procedures, all of which did not exist in the context in which the Commission was considering the draft articles on State responsibility.

354. The Special Rapporteur stressed the value of alternative formulations for "crimes", such as "international wrongful act of a serious nature", or "exceptionally serious wrongful act", some of which were distinct legal wrongs in themselves (e.g. aggression, genocide), some of which were aggravated forms of breaches of general obligations (e.g. systematic torture). The acts covered by those phrases were thus determined by the context, the gravity of the breach as well as the content of the primary obligation. He proposed to include a further article located in Chapter I of Part Two by way of clarification.[80]

(b) Collective countermeasures (articles 50 A and 50 B)

355. The Special Rapporteur distinguished between two situations in relation to the question of collective countermeasures: (1) where a State was the victim of the breach, and (2) where no State was the victim of the breach. In his view, where a State itself had the right to take countermeasures as a result of the breach of an obligation to the international community as a whole or any multilateral obligation, other States parties to the obligation should be able to assist it, at its request, and within the limits of the countermeasures it could have taken itself. That was a form of "collective" countermeasures, in that they could be taken by any of the States involved in some collective interest, and had a direct analogy to collective self-defence. The other States were themselves affected, because an obligation that was owed to them (as part of a group or as members of the international community) was breached.

356. The more difficult question was the taking of collective countermeasures in relation to the situation where there was no victim State. State practice in such regard was embryonic, partial, not clearly universal, and controversial. The *opinio juris* associated with that practice was also unclear. There was a case therefore for the Commission to decide to instead adopt a saving clause leaving it to the future. While such a saving clause remained an option if agreement could not be reached, in his view the Commission should make a concrete proposal

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[80] The text of the additional article to be included in Chapter I of Part Two proposed by the Special Rapporteur reads:

> The obligations of the responsible State set out in this Part may be owed to another State, to several States, to all other States parties or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.

A/CN.4/507/Add.4, note 801.

with a view to receiving comments on it from the Sixth Committee, on the basis of which a final decision would be taken. He therefore proposed that the States parties to an obligation owed to the international community as a whole should have the right to take collective countermeasures in response to a gross and well-attested breach of such an obligation: in his view this was the least that could be done in the context of egregious breaches, such as genocide.

357. He proposed two articles on countermeasures, to be inserted in Chapter III of Part Two *bis* before article 50 *bis*, the first dealing with countermeasures on behalf of an injured State (art. 50 A),[81] and countermeasures in cases of serious breaches of obligations to the international community as a whole (art. 50 B).[82]

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[81] The text of article 50 A proposed by the Special Rapporteur reads:

Article 50 A

Countermeasures on behalf of an injured State

> Any other State entitled to invoke the responsibility of a State under [article 40 *bis* (2)] may take countermeasures at the request and on behalf of an injured State, subject to any conditions laid down by that State and to the extent that that State is itself entitled to take those countermeasures.

A/CN.4/507/Add.4, para. 413.

[82] The text of article 50 B proposed by the Special Rapporteur reads:

Article 50 B

Countermeasures in cases of serious breaches of obligations to the international community as a whole

> (1) In cases referred to in article 51 where no individual State is injured by the breach, any State may take countermeasures, subject to and in accordance with this Chapter, in order to ensure the cessation of the breach and reparation in the interests of the victims.
>
> (2) Where more than one State takes countermeasures under paragraph 1, those States shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled.

A/CN.4/507/Add.4, para. 413.

(c) Consequences of serious breaches of obligations to the international community as a whole (article 51)

358. The Special Rapporteur noted that the additional legal consequences that, according to existing article 52, flowed from a "crime" within the meaning of article 19 had either been eliminated in the second reading review, or were trivial. However, if the breaches were egregious breaches of obligations owed to the international community as a whole, and in a situation where there was no injured State, it was arguable that other States, members of the international community, had to be able to seek at least aggravated damages on behalf of the actual victims, or the international community as a whole, and not on their own account. He proposed a new Chapter III of Part Two, entitled "Serious breaches of obligations to the international community as a whole", containing a single article 51,[83] which was article 53, as

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[83] The text of article 51 proposed by the Special Rapporteur reads:

Article 51

Consequences of serious breaches of obligations
to the international community as a whole

(1) This Chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an obligation owed to the international community as a whole.

(2) Such a breach entails, for the State responsible for that breach, all the legal consequences of any other internationally wrongful act and, in addition, [punitive damages] [damages reflecting the gravity of the breach].

(3) It also entails, for all other States, the following further obligations:

(a) not to recognize as lawful the situation created by the breach;

(b) not to render aid or assistance to the State which has committed the breach in maintaining the situation so created;

(c) to cooperate in the application of measures designed to bring the breach to an end and as far as possible to eliminate its consequences.

(4) Paragraphs 2 and 3 are without prejudice to such further penal or other consequences that the breach may entail under international law.

A/CN.4/507/Add.4, para. 412.

adopted on first reading. But it would be bizarre if the only legal consequences of a serious breach were legal consequences for third States; he had accordingly proposed that a State responsible for such a breach should be obliged to pay punitive or expressive damages sought on behalf of the victims. A definition of serious breach should be included in article 51. Article 19, which performed no function at all in the rest of the draft articles, could be deleted. While there was much authority for the proposition that punitive damages did not exist in international law, he suggested that such a reference could nonetheless be included, at least as one alternative. He also proposed in paragraph 4 to reserve to the future such penal or other consequences that the breach may entail under international law, including developing international law. In addition, he proposed an additional paragraph to be included in article 40 *bis*, relating to what each of the basic categories of States, i.e. injured States and other States, could seek in that context.[84]

20. Summary of the debate on the invocation of responsibility to a group of States or to the international community

(a) General considerations

359. Agreement was expressed with the general approach of the Special Rapporteur, although numerous comments and suggestions for drafting improvements were made.

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[84] The text of the additional paragraph to article 40 *bis* proposed by the Special Rapporteur reads:

Article 40 *bis*

A State referred to in paragraph (2) may seek:

(a) cessation of the internationally wrongful act, in accordance with article 36 *bis*;

(b) on behalf of and with the consent of the injured State, reparation for that State in accordance with article 37 *bis* and Chapter II;

(c) where there is no injured State:

(i) restitution in the interests of the injured person or entity, in accordance with article 43, and

(ii) [punitive damages] [damages reflecting the gravity of the breach], in accordance with article 51 (2), on condition that such damages shall be used for the benefit of the victims of the breach.

A/CN.4/507/Add.4, note 810.

360. With regard to the compromise of 1998, the view was expressed that a systematic development of obligations *erga omnes* and peremptory norms, would constitute a satisfactory replacement for article 19. Conversely, it was stated that, while the Special Rapporteur had made a valiant attempt at reaching compromise in the Commission on the question of international crimes, his proposal was not entirely satisfactory to the proponents of international "crime". It was proposed that, while article 19 could be deleted, the reference to international crimes should be retained in the text in article 51, paragraph 1, since the notion had become part of the language of international law. By following the Special Rapporteur's approach, the Commission should not be seen to be abandoning the notion of crime; rather it was saying that its place was not, or not primarily, in the draft articles on State responsibility. Therefore, it was suggested that if article 19 were deleted, and no reference to "crime" were retained in the draft articles, a study of international crime could be included in the Commission's long-term programme of work.

361. Others strongly urged caution so as not to imperil the entire exercise. It was disputed that the term "State crime" had been accepted in international law, or that the deletion of article 19 necessarily meant the abandonment of the concept of international crime. Its deletion was preferable so as to avoid a lengthy debate on crime by instead focusing on the consequences that arose from serious breaches of international obligations, breaches determined, like all other obligations, in accordance with Part One of the draft articles.

362. Still others viewed the term "crime" as part of international law, albeit subject to widely differing interpretations. According to one interpretation, the word "crime" did not have a penal connotation in the context of international law. Instead it was a reference to the gravity of the conduct of the responsible State. The recognition of the existence of a crime arose from the basic proposition that crimes, such as genocide, could be committed by a State, and could not be equated with normal, albeit regrettable, breaches of international obligations.

363. In addition, the view was expressed that the text confused what were different categories, i.e. obligations arising from peremptory norms, *erga omnes* obligations, and collective obligations. It was proposed that further study be undertaken on breaches of peremptory norms, and that a saving clause be inserted in the text to the effect that the draft articles did not prejudge any further consequences which could arise in case of a breach of a peremptory norm of international law.

(b) Collective countermeasures (articles 50 A and 50 B)

364. While different views were expressed in the Commission regarding the notion of collective countermeasures as found in the text of proposed articles 50 A and 50 B, support was voiced for both articles.

365. The view was expressed that what the Commission was doing, rather than codifying the law of State responsibility, was constructing a system of multilateral public order, and that developments in the international legal order depended on progress in the international community and not just in the development of norms. Premature efforts to create rules about collective countermeasures could damage both the draft articles and the gradual development of the new notions that had been referred to.

366. It was also queried how much the question concerned the responsibility of States, as opposed to the maintenance of international peace and security. In the view of some, support for collective countermeasures was only possible in the context of the action of competent international organizations, whether regional or universal; an *ad hoc* delegation of the right to respond, to a group of countries acting outside any institutional ambit, was very difficult to accept. Furthermore, it was suggested that the draft articles failed to properly distinguish between individual countermeasures, whether taken by one State or by a group of States, on the one hand, and other existing institutions, such as collective self-defence and various collective security arrangements. Indeed a violation of obligations *erga omnes* could be of such magnitude as to prompt measures under Article 51 or Chapter VII or VIII of the Charter.

367. The view was further expressed that the analysis of State practice neither demonstrated nor justified the existence of a group of legal measures accepted by all States, so as to establish "collective countermeasures" as a new legal institution. On the other hand, issue was taken with the statement that such measures were limited to the actions of Western States. Various examples of collective countermeasures taken by non-Western States demonstrated the contrary. Others took the view that the review of State practice did not reveal the existence of collective countermeasures, but rather politically motivated measures. This view did not reflect a universal opinion among States, or in the decisions of, for example, the Commission on Human Rights. The Special Rapporteur noted that in giving examples of such collective measures, he had not taken, and he did not expect the Commission to take any position on their lawfulness. He had cited them rather to illustrate the context in which the issues had arisen.

368. Others noted that, far from reflecting a dramatic new development, the scope of application of the regime being proposed would be very limited, since there were several regimes to regulate non-compliance in various areas of international law already in place, which excluded or severely limited such responses. Furthermore collective countermeasures would be subject to the basic limitations on countermeasures in Chapter II of Part Two *bis*, and would only apply to serious, manifest and well-attested breaches. A feasible regime of pacific collective countermeasures could be a viable alternative to the use of forceable measures to induce a State to return to legality.

369. The preference was expressed for circumscribing the group of possible States entitled to take collective countermeasures, to include only a group of States in the same region. It was also proposed that whenever a procedure of collective decision-making was required, such procedure had to be resorted to before embarking on collective countermeasures. In addition, the principle of *non bis in idem* could be applied by analogy so as to prevent the possibility of multiple sanctions for the breach. Furthermore, the term "collective countermeasures" was considered a misnomer, since it implied a link to bilateral countermeasures. Instead, the action envisaged was a reaction to a violation of collective obligations, and could be undertaken by a single State or by a group of States. Support was expressed for an alternative formulation such as "multilateral sanctions".

370. As to the scope of such measures, the view was expressed that, in most if not all cases, they were resorted to only to induce cessation of the allegedly wrongful act, and not reparation. Therefore, it was proposed that the purpose of collective countermeasures be limited in the draft articles to seeking cessation and assurances and guarantees of non-repetition. In response, the Special Rapporteur expressed the view that it was difficult to limit collective countermeasures to cessation, since there may be situations of restitution after the wrongful act ceased, for example, after a crime against humanity had ceased, its consequences, such as massive displacement of the target population, continued.

371. Some members pointed out that article 50 A raised the same concerns as those in cases of an invitation by a State to others in the exercise of self-defence, or intervention by invitation in humanitarian cases. Caution was advised: where a State suffered no direct harm, there was a need to limit its involvement. However, article 50 A was open-ended and could be misused. In addition, a reference to the gravity of the breach was necessary, since the proposed text seemed

to allow such collective countermeasures irrespective of the gravity of the breach, and subject only to the test of proportionality. Indeed it was suggested that the distinction between articles 50 A and B was marginal and even artificial. The two proposals shared the same point of departure: that there was a breach of an essential and important rule that concerned the international community as a whole, and which justified a reaction by all the members of the community. States other than the injured State intervened not on its behalf, under article 50 A, but as members of the international community, whose interests had been threatened. Such action could be aimed at the cessation of the breach, guarantees and assurances of non-repetition and reparation. If the obligation was owed to the international community as a whole all States could take collective countermeasures under article 50 A. By contrast the Special Rapporteur pointed out that article 50 A covered a completely different situation than article 50 B. Article 50 A related to the situation where there was an obligation to a group of States, and a particular State was specifically injured by that breach. The other States parties to that obligation could take collective countermeasures on behalf of that State, to the extent that State agreed, and within the sphere of action open to that State. Several States, sharing the same collective interest, were responding to a single breach on behalf of the particular victim. This had nothing to do with grave breaches of community obligations covered by article 51. As formulated, article 50 B was concerned only with the case where there was no injured State in the sense of article 40 *bis*, paragraph 1. As such, article 50 A had a much wider application.

372. Regarding article 50 B, the view was expressed that the philosophy underlying the judgment of the International Court of Justice, in the 1966 *South West Africa* cases, that States could only act where their national interest was involved had been a blow to international law, and the disavowal of that approach implied by the various articles under discussion was welcomed. It was queried whether the concept of the interest of the international community as a whole had become a fixed concept, and whether it necessarily implied the existence of a dispute settlement procedure to ascertain such interest. Furthermore, the question was posed whether it was correct to make reference to the interests of the victims. In cases such as genocide, the entire international community was concerned. Others disagreed; the concrete interest of the victims of such a breach should be paramount, and therefore provision should be made to allow intervention on behalf of the victims, and to obtain reparation on their behalf.

373. As to the formulation of article 50 B, the view was expressed that its title was too broad, since it could equally cover article 50 A cases. Paragraph 1 should also refer to assurances and guarantees of non-repetition. The term "victims" had criminal connotations, and could be replaced by another formula.

(c) Consequences of serious breaches of obligations to the international community as a whole (article 51)

374. A measure of agreement was expressed with the proposal of the Special Rapporteur, which was generally considered to be an improvement on former article 19, and represented a balanced compromise. Others disagreed strongly: creating distinctions in Part Two based on qualitative distinctions in the primary rules, was little different from creating new rules. It amounted to reintroducing article 19 through the back door and was outside the scope even of progressive development, let alone codification. Furthermore, article 51 presupposed the establishment of a system of collective sanctions of an essentially punitive nature, identifiable with the enforcement measures provided for in the Charter of the United Nations. There was no imperative need to create such a parallel system.

375. Others thought the proposals did not go far enough. While the commission of a crime could not in itself be a basis for the autonomous competence of international courts, it opened the way for an *actio popularis*. Furthermore, it was possible to foresee a form of dispute settlement on the analogy of article 66 of the 1969 Vienna Convention. Moreover the existence of the crime had implications with regard to the choice as between forms of reparation: in particular, the State directly injured could not renounce full restitution, since it was the interests of the international community as a whole that were being protected.

376. With regard to paragraph 1, it was observed that the title of Chapter III, "serious breaches of obligations" did not correspond to the formula used in paragraph 1, which referred to "serious and manifest" breach. The word "manifest" was considered problematic since it implied that blatant actions by a State were qualitatively worse than subtle or concealed ones. It was suggested that the breach be qualified as "well-attested" or "reliably attested".

377. The view was further expressed that paragraph 1 should constitute a separate article, and that its contents be expanded along the lines of article 19, paragraph 2, as adopted on first reading. Furthermore, the article could contain a non-exhaustive enumeration of most of the serious breaches, as had been the case in article 19, paragraph 3. The Special Rapporteur agreed

with the idea of separating article 51 into two articles, with additional elements included within it. However, in common with many members, he was opposed to including an article in Part One, or to giving specific examples in the text as distinct from the commentary.

378. Concerning paragraph 2 while caution was advised when dealing with the reference to "punitive damages", support was expressed for retaining the reference in the text, which rectified an omission in article 19. However, the view was expressed that such reference had too great a penal connotation, and was not confirmed by existing practice. The example of article 228 of the European Communities Treaty, cited in the report, was considered a special case and not at all indicative of a trend in general international law. Doubt was further expressed regarding the practicalities of implementing the provision, since it was linked to the possibility of an institutionalized response to international crimes of States. Preference was expressed for the alternative formulation "damages reflecting the gravity of the breach".

379. In relation to paragraph 3, subparagraph (a), it was pointed out that the obligation of non-recognition was based on extensive practice, and that such non-recognition in the legal context was more a reaction to the invalidity of an act, not only to its illegality.

380. The question was raised whether subparagraph (b) was not covered by article 27, in Chapter IV of Part One, since it entailed participation in the wrongful act. In response, the Special Rapporteur noted that the emphasis in article 27 was on aid or assistance in respect of the commission of the wrongful act, whereas the emphasis in paragraph (b) was the situation created as a result of the act. In many cases it would not make a difference because the primary obligation, which was a continuing obligation, would be breached in relation to the continuing situation. However, other cases could be envisaged, for example, past behaviour amounting to a crime against humanity causing a population to flee to another State. The question was whether the population was to be allowed to return once the behaviour had ceased. In such contexts paragraph (b) had a role to play.

381. The view was expressed that subparagraph (c) was problematic since it could lead to the interpretation that States would be obliged to cooperate with another State unilaterally taking countermeasures. Likewise, its implications for the law of neutrality were not clear. As a minimum, paragraph (c) should be limited only to those actions which the responding State was entitled to take under international law.

382. As to paragraph 4, the view was expressed that it was not clear what "penal consequences" were being referred to. Strong reservations were expressed regarding the existence of "penal" consequences in international law with regard to States. It was further considered appropriate to leave the indication of further consequences to future developments, although it had to be recognized that it was likely that such developments would occur in regard to specific types of breaches. Indeed, paragraph 4 was strictly unnecessary since, irrespective of the form of the draft articles, they could not prevent the development of either customary or conventional law.

383. It was further suggested that provision be made in article 51 to the effect that individuals involved in the commission of a serious breach by a State would not be entitled to rely, in criminal or civil proceedings in another State, on the fact that they had acted as State organs; it was paradoxical for international law to protect conduct which at the same time it particularly condemned. Moreover such a provision would insert a significant deterrent aspect into the text. In response, the Special Rapporteur noted that such proposal was not properly a matter of State responsibility, but rather one of individual criminal responsibility. Furthermore, he did not support the idea that the State became "transparent" only in extreme cases. Instead, for breaches of international law a State was always transparent *qua* State, i.e. it was always accountable for its acts, and individuals, whether or not they undertook State functions, were generally accountable for their acts in terms of the existing rules of international criminal law. It would be confusing to deprive them of an immunity which international criminal law had never, since 1945, recognized.

21. Special Rapporteur's concluding remarks on the debate on the invocation of responsibility to a group of States or to the international community

384. The Special Rapporteur referred to the views of those members who had expressed scepticism or doubt about the compromise approach being proposed, and who had proposed alternative solutions, such as encapsulating the issue in a single saving clause. While he shared some of the concerns expressed, he felt it worthwhile to proceed along the lines of his compromise proposal, at least for the purposes of receiving comment from the Sixth Committee, and because it reflected a compromise position between the starkly contrasting views expressed in the Commission. While the time was not yet ripe for an elaborated regime of "crimes", there

was general agreement that it was appropriate to include the basic concept that there were obligations which States held to the international community as a whole, and which were by definition serious, and their breach therefore concerned all States. While minor breaches of such obligations could occur (e.g. isolated cases of inhuman treatment, not warranting any multilateral response), in other cases the definition of the obligations themselves, such as with genocide and aggression, ensured that the breaches in question would be serious.

385. With regard to collective countermeasures, the Special Rapporteur pointed to the significant level of approval of his proposals for article 50 A and 50 B, notwithstanding some of the concerns that had been expressed. There was clear practice to the effect that where a State was individually injured and was individually entitled to take countermeasures, another State with a legal interest in the norm violated could be allowed to assist.

386. Article 50 B was a modified and reduced form of what existed on first reading, and was broadly accepted, this acceptance extending to several members who seemed to favour countermeasures only when they were multilateral. While he did not favour limiting those forms of multilateral reactions to a single region, he accepted the point that such measures undertaken in a single region may be a reflection of a community concern. He also agreed with the view that responses to breaches of obligations to the international community as a whole could be responses taken by one State, although they could also be taken by a number of States.

387. In connection with article 51, the Special Rapporteur noted that general support was expressed for transmitting the text to the Drafting Committee, and he indicated his willingness to consider splitting the article into two or more provisions, as had been suggested. He did not favour the idea of relabelling article 51 by reference to the notion of "essential" obligations. There were many obligations which were "essential" to the international community, but the individual relationships were essentially bilateral, e.g. in the case of diplomatic immunity. Instead, the core concept had to be that of the *Barcelona Traction* case, i.e. obligations to the international community as a whole in which every State individually had an interest in compliance.

388. He fully accepted that the definition of the category in article 51, paragraph 1, could be improved by reference to some of the content of article 19, paragraph 2, as adopted on first reading. Although article 51, paragraph 4, was not necessary in light of article 38, as adopted on

first reading, he preferred its retention given future possibilities in the field. However he did not feel strongly about the term "penal", especially since its deletion would not affect the operation of the provision. Neither did he oppose the deletion of the reference to "punitive" consequences.

389. With regard to the question of the "transparency" of the State, and the alleged consequence of serious breaches of essential obligations involving individual criminal responsibility, he reiterated the view that the issue should not be included in the draft articles, since it was concerned either with the category of individual criminal responsibility of persons, or alternatively the category of State immunity. He preferred to reserve the legal position, which had, at any rate, been under consideration in the context of the 1998 Rome Statute of the International Criminal Court, particularly in the context of article 27 combined with article 98.

22. Introduction by the Special Rapporteur of the general provisions (Part Four)

(a) Special provisions made by other applicable rules (article 37)

390. The Special Rapporteur stated that the Commission had agreed to the inclusion of a *lex specialis* provision, based on article 37 adopted on first reading. He proposed a reformulation of article 37[85] since it was not enough that there was a provision in an international treaty or elsewhere that dealt with the particular point for it to be *lex specialis*. Instead, it had to deal with the point in such a manner that it could be said on the interpretation of the provision that it intended to exclude other consequences. That aspect was missing from the first reading formulation, and was incorporated in his proposal.

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[85] The text of article 37 proposed by the Special Rapporteur reads:

Article 37

Special provisions made by other applicable rules

> The provisions of these articles do not apply where and to the extent that the conditions for or the legal consequences of an internationally wrongful act of a State have been exclusively determined by other rules of international law relating to that act.

A/CN.4/507/Add.4, para. 429. For the analysis of this article by the Special Rapporteur, see ibid, paras. 415-421.

(b) Responsibility of or for the conduct of an international organization (article A)

391. Article A,[86] dealing with the responsibility of or for the conduct of an international organization, had been provisionally adopted by the Drafting Committee in 1998, and had been generally supported by the Commission.

(c) Rules determining the content of any international obligation (article B)

392. The Special Rapporteur suggested that the Commission could consider a complementary provision to article 30 (5) of the Vienna Convention on the Law of Treaties, saving the law of treaties. However, the draft articles on State responsibility were not concerned with the existence or content of a primary obligation, but instead with the consequences of the breach. He thus proposed a more general formulation, as article B,[87] applying not only to the law of treaties, but also to customary international law.

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[86] The text of article A proposed by the Special Rapporteur reads:

Article A

Responsibility of or for the conduct of an international organization

These articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

A/CN.4/507/Add.4, para. 429.

[87] The text of article B proposed by the Special Rapporteur reads:

Article B

Rules determining the content of any international obligation

These articles are without prejudice to any question as to the existence or content of any international obligation of a State, the breach of which may give rise to State responsibility.

A/CN.4/507/Add.4, para. 429.

(d) Relationship to the Charter of the United Nations (article 39)

393. Article 39, as adopted on first reading, had been the subject of severe criticism, including by the previous Special Rapporteur, Mr. Arangio-Ruiz. The current Special Rapporteur agreed with those criticisms, and therefore proposed a simpler version of article 39,[88] which could not be viewed as a covert amendment to the Charter of the United Nations.

(e) Other saving clauses

394. In the Special Rapporteur's view, the above-mentioned saving clauses were the only necessary clauses. For the reasons stipulated in paragraph 428 of his report, he did not support the inclusion of saving clauses on diplomatic protection, or relating to questions of invalidity and non-recognition, or non-retroactivity. A definition clause was also unnecessary. However, if the Commission eventually were to decide in favour of a set of draft articles in the form of a draft convention, other provisions would be needed.

23. Summary of the debate on the general provisions (Part Four)

(a) Special provisions made by other applicable rules (article 37)

395. Support was expressed for the Special Rapporteur's reformulation of the provision. It was pointed out that the legal solution based on interpretation, as suggested by the Special Rapporteur, was the sole plausible approach to the question of the relationship between the *lex specialis* regimes and the general regime of State responsibility. Different views were expressed as to the term "to the extent that": some thought it confusing and unnecessary, others thought it useful since other rules of international law could be partially applicable to the same

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[88] The text of article 39 proposed by the Special Rapporteur reads:

Article 39

Relationship to the Charter of the United Nations

> The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to article 103 of the Charter of the United Nations.

A/CN.4/507/Add.4, para. 429. For the analysis of this article by the Special Rapporteur, see ibid., paras. 422-426.

wrongful conduct. Therefore, the word "exclusively" was inappropriate. It was also queried whether the words "the conditions for the legal consequences of an internationally wrongful act" included the definition of such an act, the general principles, the act of the State under international law and the breach itself.

(b) Responsibility of or for the conduct of an international organization (article A)

396. Support was expressed for the proposed article, and it was noted that the topic of the responsibility of international organizations could be taken up by the Commission in the future.

(c) Rules determining the content of any international obligation (article B)

397. Support was expressed for the inclusion of the provision in the draft articles.

(d) Relationship to the Charter of the United Nations (article 39)

398. Support was expressed for the Special Rapporteur's reformulation of the provision, which was considered to be a better text than that on first reading. The view was also expressed that if the draft articles were to be adopted in the form of a declaration, there would be no need for the inclusion of a provision on the relationship with the Charter. Moreover article 103 itself was sufficient to resolve the matter, and article 39 would not be needed. According to a different view, article 39 was particularly important to ensure that Article 103 of the Charter of the United Nations would prevail over the instrument in which the draft article were to be embodied.

399. In addition, it was observed that the issue was more complex since the draft articles on State responsibility, and the Charter of the United Nations were situated on different levels. Support was therefore expressed for retaining such an article, albeit in a less restrictive form since the proposed text for article 39 was limited to the consequences of an internationally wrongful act. Likewise, there was no reason to confine it to article 103. While that was understandable under the Vienna Convention on the Law of Treaties, since article 103 had to do with the precedence of treaties among each other, that was not the case in the context of State responsibility. All that needed to be stated was that it was without prejudice to the Charter of the United Nations.

(e) Other saving clauses

400. While support was expressed for the Special Rapporteur's proposal not to include a saving clause on diplomatic immunity, a preference was expressed for including such a clause, although in Part Two *bis*, not Part Four.

401. It was observed that, if the final text of the draft articles were to take the form of a declaration, a provision on non-retroactivity should not be included, in the expectation that the draft articles would be considered declaratory of existing law, and therefore would have a retroactive effect. Conversely, if the final form was a treaty then more provisions, including a non-retroactivity clause, would be needed.

24. Special Rapporteur's concluding remarks on the general provisions (Part Four)

402. The Special Rapporteur noted that there had been general approval of the texts he had proposed for Part Four.

403. For the reasons given by some of the members, he did not favour the deletion of article 39, especially in regard to the extensive debate the article had attracted during the first reading. Instead a simple version was more appropriate.

404. Concerning article 37, and in response to the suggestion that the word "exclusively" was not necessary in light of the reference to "the extent that", while the matter was more one of drafting, it had to be accepted that the fact that a particular norm attached a particular consequence was not by itself sufficient to trigger the *lex specialis* principle. An additional element was required, i.e. that the provision intended to exclude other consequences, which was conveyed by the phrase "exclusively".

405. In completing this review of the draft articles adopted on first reading, he thanked the members of the Commission for their patience faced with a large volume of material and many difficult issues, as well as the Secretariat and his own assistants.

Appendix

Draft articles provisionally adopted by the Drafting Committee on second reading[89]

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2 [3][90]

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

Article 3 [4]

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

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[89] The statement of the Chairman of the Drafting Committee introducing its report is reproduced in A/CN.4/SR.2662.

[90] The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

CHAPTER II

The act of the State under international law

Article 4 [5]

Attribution to the State of the conduct of its organs

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

Article 5 [7]

Attribution to the State of the conduct of entities exercising elements of the governmental authority

The conduct of an entity which is not an organ of the State under article 4 [5] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Article 6 [8]

Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 7 [8]

Attribution to the State of certain conduct carried out in the absence of the official authorities

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 8 [9]

Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Article 9 [10]

Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

Article 10 [14, 15]

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement, which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 [5] to 9 [10].

Article 11

Conduct which is acknowledged and adopted by the State as its own

Conduct which is not attributable to a State under articles 4 [5], 5 [7], 6 [8], 7 [8], 8 [9], or 10 [14, 15] shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III

Breach of an international obligation

Article 12 [16, 17,18]

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13 [18]

International obligation in force for the State

An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14 [24]

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with what is required by that obligation.

Article 15 [25]

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

Responsibility of a State in respect of the act of another State

Article 16 [27]

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 17 [28]

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 18 [28]

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this Chapter

This Chapter is without prejudice to the international responsibility, under other provisions of the present articles, of the State which commits the act in question, or of any other State.

CHAPTER V

Circumstances precluding wrongfulness

Article 20 [29]

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent

Article 21

Compliance with peremptory norms

The wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law

Article 22 [34]

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations

Article 23 [30]

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with its international obligations to another State is precluded if and to the extent that the act constitutes a countermeasure directed towards the latter State under the conditions set out in articles 50 [47] to 55 [48]

Article 24 [31]

Force majeure

1 The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation

2. Paragraph 1 does not apply if:

(a) The occurrence of *force majeure* results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(b) The State has assumed the risk of that occurrence.

Article 25 [32]

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question had no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) The situation of distress results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(b) The act in question was likely to create a comparable or greater peril.

Article 26 [33]

State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question arises from a peremptory norm of general international law;

(b) The international obligation in question excludes the possibility of invoking necessity; or

(c) The State has contributed to the situation of necessity.

Article 27 [35]

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice to:

(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) The question of compensation for any material harm or loss caused by the act in question.

PART TWO

CONTENT OF INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

General principles

Article 28 [36]

Legal consequences of an internationally wrongful act

The international responsibility of a State which arises from an internationally wrongful act in accordance with the provisions of Part One entails legal consequences as set out in this Part.

Article 29 [36]

Duty of continued performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 [41, 46]

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 [42]

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State.

Article 32 [42]

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33 [38]

Other consequences of an internationally wrongful act

The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

Article 34

Scope of international obligations covered by this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which accrues directly to any person or entity other than a State.

CHAPTER II

The forms of reparation

Article 35 [42]

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of the present Chapter.

Article 36 [43]

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Would not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 37 [44]

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 38 [45]

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 39

Interest

1. Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 40 [42]

Contribution to the damage

In the determination of reparation, account shall be taken of the contribution to the damage by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of essential obligations to the international community

Article 41

Application of this Chapter

1. This Chapter applies to the international responsibility arising from an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation, risking substantial harm to the fundamental interests protected thereby.

Article 42 [51, 53]

Consequences of serious breaches of obligations to the international community as a whole

1. A serious breach within the meaning of article 41 may involve, for the responsible State, damages reflecting the gravity of the breach.

2. It entails, for all other States, the following obligations:

(a) Not to recognize as lawful the situation created by the breach;

(b) Not to render aid or assistance to the responsible State in maintaining the situation so created;

(c) To cooperate as far as possible to bring the breach to an end.

3. This article is without prejudice to the consequences referred to in Chapter II and to such further consequences that a breach to which this Chapter applies may entail under international law.

PART TWO *bis*[*]

THE IMPLEMENTATION OF STATE RESPONSIBILITY

CHAPTER I

Invocation of the State responsibility of a State

Article 43 [40]

The injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to

(a) That State individually, or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation

  (i) Specially affects that State, or

  (ii) Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned

Article 44

Invocation of responsibility by an injured State

1 An injured State which invokes the responsibility of another State shall give notice of its claim to that State

2 The injured State may specify in particular

(a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing,

(b) What form reparation should take

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[*] The Commission has set aside Part Three (Settlement of Disputes) of the draft articles adopted on first reading Hence the gap

Article 45 [22]

Admissibility of claims

The responsibility of a State may not be invoked if

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims,

(b) The claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted

Article 46

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if

(a) The injured State has validly waived the claim in an unequivocal manner,

(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim

Article 47

Invocation of responsibility by several States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act

Article 48

Invocation of responsibility against several States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act

2 Paragraph 1

(a) Does not permit any injured State to recover, by way of compensation, more than the damage suffered,

(b) Is without prejudice to any right of recourse towards the other responsible States

Article 49

Invocation of responsibility by States other than the injured State

1 Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State if

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;

(b) The obligation breached is owed to the international community as a whole

2 A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30 [41, 46];

(b) Compliance with the obligation of reparation under Chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached

3 The requirements for the invocation of responsibility by an injured State under articles 44, 45 [22] and 46 apply to an invocation of responsibility by a State entitled to do so under paragraph 1

CHAPTER II

Countermeasures

Article 50 [47]

Object and limits of countermeasures

1 An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two

2 Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking the measures towards the responsible State

3 Countermeasures shall as far as possible be taken in such a way as not to prevent the resumption of performance of the obligation or obligations in question

Article 51 [50]

Obligations not subject to countermeasures

1. Countermeasures shall not involve any derogation from

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations,

(b) Obligations for the protection of fundamental human rights,

(c) Obligations of a humanitarian character prohibiting any form of reprisals against persons protected thereby,

(d) Other obligations under peremptory norms of general international law,

(e) Obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents

2. A State taking countermeasures is not relieved from fulfilling its obligations under any applicable dispute settlement procedure in force between it and the responsible State

Article 52 [49]

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question

Article 53 [48]

Conditions relating to resort to countermeasures

1. Before taking countermeasures, the injured State shall call on the responsible State, in accordance with article 44, to fulfil its obligations under Part Two

2. The injured State shall notify the responsible State of any decision to take countermeasures, and offer to negotiate with that State

3. Notwithstanding paragraph 2, the injured State may take such provisional and urgent countermeasures as may be necessary to preserve its rights

4. Countermeasures other than those in paragraph 3 may not be taken while the negotiations are being pursued in good faith and have not been unduly delayed

5. Countermeasures may not be taken, and if already taken must be suspended within a reasonable time if

(a) The internationally wrongful act has ceased, and

(b) The dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties

6. Paragraph 5 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith

Article 54

Countermeasures by States other than the injured State

1. Any State entitled under article 49, paragraph 1 to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this Chapter

2. In the cases referred to in article 41, any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached

3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled

Article 55 [48]

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act

PART FOUR

GENERAL PROVISIONS

Article 56 [37]

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law

Article 57

Responsibility of or for the conduct of an international organization

These articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting in the capacity of an organ or agent of a State.

Article 59 [39]

Relation to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to the Charter of the United Nations.

CHAPTER V

DIPLOMATIC PROTECTION

A Introduction

406 The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development [91] In the same year, the General Assembly in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic [92] The Working Group submitted a report at the same session which was endorsed by the Commission [93] The Working Group attempted to (a) clarify the scope of the topic to the extent possible, and (b) identify issues which should be studied in the context of the topic The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur [94] The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium

407 At its 2501st meeting, on 11 July 1997, the Commission appointed Mr Mohamed Bennouna Special Rapporteur for the topic

408 The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection"

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[91] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para 249 and annex II, addendum 1

[92] Ibid , *Fifty-second Session, Supplement No. 10* (A/52/10), chap VIII

[93] Ibid , para 171

[94] Ibid , paras 189-190

409 At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur [95] At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic [96]

410 At its fifty-first session, in 1999, the Commission appointed Mr Christopher John R Dugard Special Rapporteur for the topic,[97] after Mr Bennouna was elected as a judge to the International Criminal Tribunal for the Former Yugoslavia

B Consideration of the topic at the present session

411 At the present session, the Commission had before it the Special Rapporteur's first report (A/CN 4/506 and Corr 1 and Add 1) The Commission considered the first report contained in document A/CN 4/506 and Corr 1 at its 2617th to 2620th, 2624th to 2627th and 2635th meetings, from 9 to 12 May, 19 May to 25 May and on 9 June 2000 Due to the lack of time, the Commission deferred consideration of A/CN 4/506/Add 1 to the next session

412 At its 2624th meeting, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on articles 1, 3 and 6 The report of the Informal Consultations is reproduced in paragraph 89 below

413 The Commission considered the report of the Informal Consultations at its 2635th meeting and decided at the same meeting to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultations

1 An overview of the approach to the topic

414 Introducing his first report, the Special Rapporteur stated that taking into account that the Commission had already discussed the approach and the general issues involved in the topic in

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[95] A/CN 4/484

[96] The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para 108

[97] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para 19

the context of the preliminary report of the former Special Rapporteur and in the context of two Working Groups dealing with the topic in 1997 and 1998, and for practical reasons he had decided to move directly to proposals on the articles as this course was more conducive to focused discussion and to reaching conclusions. However, he wished to explain a few general issues which run through the articles he had proposed and could be discussed in the context of those draft articles.

415 First, he had taken the view that diplomatic protection might be employed as a means to advancing the protection of human rights. He would submit therefore that diplomatic protection remained an important weapon in the arsenal of human rights protection. As long as the State remained the dominant actor in international relations, the espousal of claims by States for violation of the rights of their nationals remained the most effective remedy for human rights protection. Instead of seeking to weaken that remedy by dismissing it as a fiction that had outlived its usefulness, every effort should be made to strengthen the rules that comprised the right of diplomatic protection. That was the philosophy on which his report was founded.

416 Second, he was not persuaded that diplomatic protection had become obsolete because of various dispute settlement mechanisms to which individuals had now been given access. While individuals were participants in the international legal system and have rights under international law, their remedies remain limited.

417 Third, he had decided deliberately to put forward the most controversial issues involved in the topic early on in order to seek guidance from the Commission and to settle them before advancing any further. This applied in particular to the issue of the use of force in the exercise of diplomatic protection, discussed in the context of article 2, and to the question whether there is a duty on the part of States to exercise diplomatic protection, discussed in the context of article 4.

418 With regard to the structure, he stated that the eight draft articles proposed in document A/CN.4/506 fell into two groups. Of the first group (arts. 1 to 4), articles 1 and 3 were largely foundational, whereas articles 2 and 4 were particularly controversial. Articles 5 to 8, the second group, were equally controversial, but all dealt with issues relating to nationality.

2. Article 1[98]

(a) Introduction by the Special Rapporteur

419. The Special Rapporteur explained that article 1 sought to be not a definition, but rather a description, of the topic. Nor did the article attempt to address the subject of functional protection by an international organization - a matter briefly touched upon in paragraph 38 of the report, and one which perhaps had no place in the study, raising, as it did, so many different issues of principle. The doctrine of diplomatic protection was clearly closely related to that of State responsibility for injury to aliens. Indeed, the Commission's initial attempt to draft articles on State responsibility had tried to cover both the principles of State responsibility as currently formulated and the subject of diplomatic protection. The idea that internationally wrongful acts or omissions causing injury to aliens engaged the responsibility of the State to which such acts and omissions were attributable had gained widespread acceptance in the international community by the 1920s. It had been generally accepted that, although a State was not obliged to admit aliens, once it had done so it was under an obligation towards the alien's State of nationality to provide a degree of protection to his person or property in accordance with an international minimum standard of treatment due to aliens.

420. The term "action" in article 1 presented some difficulties. Most definitions of diplomatic protection failed to deal adequately with the nature of the actions open to a State exercising diplomatic protection. The Permanent Court of International Justice had appeared to distinguish between "diplomatic action" and "judicial proceedings", a distinction repeated by the

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[98] Article 1 reads:

Article 1

Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

A/CN.4/506, p. 11.

International Court of Justice in the *Nottebohm*[99] case and by the Iran-United States Claims Tribunal in *Case No. A/18*.[100] In contrast, legal scholars drew no such distinction, and tended to use the term "diplomatic protection" to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, in the final resort, the use of force.

(b) Summary of the debate

421. The report of the Special Rapporteur was found to be stimulating and well researched and was welcomed for discussing, in a direct and open manner, the most controversial issues the Commission might have to face in connection with diplomatic protection. The report raised a number of important issues in the context of article 1 which also affected the approach to the topic.

422. It was noted that the Special Rapporteur accorded great importance in his report to diplomatic protection as an instrument for ensuring that human rights were not infringed. However, it was suggested that this issue may have been over-emphasized. It was not immediately obvious that use was made of diplomatic protection when a State raised human rights issues for the benefit of its nationals. Under international law, obligations concerning human rights were typically obligations *erga omnes*. Any State could request cessation of the breach, whether the persons affected were its own nationals, nationals of the wrongdoing State or nationals of a third State. Thus, any requirement of nationality of claims appeared to be out of context when human rights were invoked. States were mainly concerned with protecting the human rights of their own nationals, however, and while the rules of general international law on human rights did not for most purposes distinguish between persons protected according to their nationality, States did tend to be more protective where their own nationals were concerned. Hence, it could safely be suggested that the concept of diplomatic protection extended to the protection of the human rights of one's nationals. There were, however, difficulties. The International Court of Justice in its famous dictum in the *Barcelona Traction* case, indicated that only the State of nationality could intervene in cases of diplomatic protection, but in human rights cases, any State could do so.

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[99] 1955 *I.C.J. Reports*.

[100] Case No. A/18 (1984) 5 I.U.S.C.T.R., p. 251.

423 It was further noted that the word "action" in article 1 created difficulties. Diplomatic protection was a long and complex process. When a State received a complaint from an individual, it examined the complaint to determine how serious it was and whether or not it was lawful. That first preparatory, investigatory stage did not constitute diplomatic protection. Only once the Government decided to make a claim on behalf of its national to the Government that had allegedly failed to apply to that person certain rules of international law, did diplomatic protection come into operation.

424 In this context, views differed as to whether diplomatic protection applied to actions taken by a Government to prevent injury to its national (that is before the occurrence of a wrongful act) or only to wrongful acts of the State that had already occurred. Some members of the Commission supported the latter view, that is that diplomatic protection was for an internationally wrongful act of another State which had caused injury to a national of another State. An involvement of the State of nationality in negotiations with other States with a view to preventing injury to their nationals did not fall within the scope of diplomatic protection as that notion is understood in the classical sense. Some members of the Commission took a different view. They stated that in practice States may take up concerns of their citizens with regard to actions or measures which might in future cause injury to those nationals. The involvement of the State of nationality at this stage should also be characterized as diplomatic protection. At any rate diplomatic protection was not an "action" as such; it was the setting in motion of a process by which the claim of a natural or legal person was transformed into an international legal relationship. In that purely technical sense, diplomatic protection was one of the means of making the international responsibility of the State effective.

425 With regard to the nature of diplomatic protection, two different views were expressed. According to one view, diplomatic protection was the right of the individual. According to this view, the constitution of a number of States upheld the right of nationals to diplomatic protection, a trend compatible with the development of the protection of human rights in contemporary international law. According to another view, supported by many members of the Commission, diplomatic protection was a discretionary right of the State. A State had the right to present a claim to another State for a wrongful act committed by the latter, even if it was not to the State itself but to its national, who had suffered the injury caused by that wrongful act.

However, there was no obligation on the State to present a claim on behalf of an injured national. The constitutional obligation to extend diplomatic protection to nationals had no bearing on international law with regard to the institution of diplomatic protection.

426. Concerning the definition of injury, there was general agreement that article 1 should be drafted to show that diplomatic protection is concerned with injury under international law, not injury under domestic law. As to whether the breach of domestic law entailed the right to exercise diplomatic protection, it was suggested that if domestic law was violated in respect of an alien and no redress was provided in the national courts, that should give rise to injury under international law. This suggestion, however, was not welcomed by some members since the problem under diplomatic protection was not denial of due process, but exhaustion of domestic remedies, which was a broader issue than denial of due process. Diplomatic protection could be triggered even in the absence of denial of due process, and to focus on denial of justice would involve consideration of primary rules.

427. It was noted that because of the relationship between State responsibility and diplomatic protection, the Commission in its work on the latter should use terms consistent with the terms used in the former. It was also stated that the concept of "diplomatic protection" should be clarified so as to avoid any confusion between it and the notion of protection, privileges and immunities of diplomats and matters dealing with consular and diplomatic representation and functions.

(c) Special Rapporteur's concluding remarks

428. The Special Rapporteur stated that article 1 had not given rise to any major objections. However, doubts had been expressed about the language employed, in particular the word "action", which had been construed differently by different members. It had been suggested that the matter should be given closer attention. Some members had also suggested that the language of article 1 should be brought into line with that of the articles on State responsibility.

429. Comments had been made about the need for a wrongful act to have been committed before diplomatic protection could be exercised. However, attention was drawn by some members, to the possibility of a potentially internationally wrongful act, such as a draft law providing for measures which could constitute an internationally wrongful act. That question, too, would have to be considered further by the Drafting Committee.

3. Article 2[101]

(a) Introduction by the Special Rapporteur

430. The Special Rapporteur explained that article 2 raised two highly controversial questions first, the perennially topical question whether forcible intervention to protect nationals was permitted by international law; and second, whether the matter fell within the sphere of diplomatic protection. He had been reluctant to devote too much space to the matter in his commentary, particularly as there was a prospect of article 2 being rejected. He recalled that the previous Special Rapporteur, in his preliminary report in 1998, had declared without qualification that States might not resort to the threat or use of force in the exercise of diplomatic protection. He therefore felt obliged not to ignore the subject in his report.

431. He stated that Article 2, paragraph 4, of the Charter of the United Nations prohibited the use of force. The only exception, as far as unilateral action was concerned, was embodied in Article 51 of the Charter, on the right of self-defence. The right of self-defence in international law had been formulated well before 1945. It was generally accepted that the wide scope of that right included both anticipatory self-defence and intervention to protect nationals. Article 51

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[101] Article 2 reads:

Article 2

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful means;

(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their persons;

(d) The use of force is proportionate in the circumstances of the situation;

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

A/CN.4/506, p. 16

made no reference to them, but only to cases in which an armed attack occurred. A considerable scholarly debate had arisen among various authors taking diverse positions on the issue. The decisions of international tribunals and political organs of the United Nations provided little guidance on the subject. Courts had generally avoided the topic. Hence, the law was uncertain. However, the right to forcibly protect its own nationals had been greatly abused in the past and still lent itself to abuse. Consequently, if it was to be included, it should be narrowly formulated. In attempting to do that, he proposed article 2 which he believed reflected State practice more accurately than an absolute prohibition on the use of force. The latter was difficult to reconcile with actual State practice. So was the broad right to intervene, which was impossible to reconcile with the protests made by the injured State and third States in the case of an intervention to protect nationals.

432. In paragraph 60 of the report he pointed out that the study did not deal with humanitarian intervention in the sense of forcible protection of the rights of nationals of another country. He understood that article 2 would provoke considerable debate. But he would find it helpful to have a decision on the subject at the outset so as to preclude the issue arising again when the subject matter had already been debated at length by the Commission. The report contained sufficient material for a decision to be taken as to whether a provision of that nature should be included in the draft.

(b) Summary of the debate

433. Two different views were expressed with respect to article 2.

434. According to one view, article 2 was objectionable as it did not include a categorical rejection of the threat or the use of force in the exercise of diplomatic protection. The draft articles should not include any exceptions that might cast doubts on that prohibition. Circumstances exempting a State from responsibility for an act of force might possibly encompass imminent danger or a state of necessity, matters which should be regulated by the draft on State responsibility. Nevertheless, in the context of diplomatic protection, any rule permitting, justifying or legitimizing the use of force was dangerous and unacceptable. As the Special Rapporteur had pointed out, since the formulation of the Drago doctrine in 1902 and the Porter Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, the prohibition of the threat or use of force had been one of the most notable

aspects of the development of the right of diplomatic protection, which had certainly furthered the development of general international law. It had culminated in the rule embodied in Article 2, paragraph 4, of the Charter of the United Nations. In addition taking account of the historic use of force under the banner of diplomatic protection, it was essential to maintain the first part of the opening clause of article 2 which read "the threat or use of force is prohibited as a means of diplomatic protection" somewhere in the draft, as it was a significant element in the development of customary international law on diplomatic protection. The remainder of the wording proposed by the Special Rapporteur, as from "except in the case of …" should, however, be expunged. It should be remembered that the text on State responsibility, article 50 (a), on countermeasures, adopted on first reading, expressly forbade a State to resort by way of countermeasures to the threat or use of force as prohibited by the Charter. Nevertheless any attempt to delete the first part of the first sentence in article 2 as drafted by the Special Rapporteur might be misinterpreted at a time when there was a growing tendency to use force in exceptional cases.

435. In the context of the view expressed in the previous paragraph, it was also stated that the Special Rapporteur's proposal was also at variance with another crucial principle of international law, that of non-intervention in the internal affairs of States as expressed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which stipulated that no State or group of States had the right to intervene, directly or indirectly, for any reason whatsoever - and thus including the protection of nationals - in the internal or external affairs of any other State and that consequently, armed intervention and all other forms of interference or attempted threats against the personality of a State or against its political, economic or cultural elements were in violation of international law.

436. According to another view, the question of the use of force was not part of the topic of diplomatic protection and lay outside the Commission's mandate. Diplomatic protection was related to the law of responsibility and was essentially concerned with the admissibility of claims. The Commission could not possibly deal with all of the mechanisms, some of them very important in themselves, by which protection could be given to individuals who had complaints

against States. Those mechanisms comprised a whole range of actions, including peacekeeping, consular activities and so forth. In addition, the use of force to protect nationals abroad could not be considered in isolation from the whole question of the use of force and the application of the Charter of the United Nations. The actions referred to by the Special Rapporteur might be justified or excused on the basis of other principles of international law, such as necessity, but like humanitarian intervention, those were controversial issues and had no bearing on the issue of diplomatic protection.

437. Members supporting the first view found it inconceivable that States should be given a legal basis, within the framework of diplomatic protection, that would allow them to use force other than in self-defence, as provided for in Article 51 of the Charter of the United Nations. The notion of self-defence could not be stretched, in their view, to cover the protection of the nationals of a State in a foreign country. However, some of the members who supported the second view, namely that the question of the use of force fell outside the scope of diplomatic protection, were of the view that the Special Rapporteur was correct in his interpretation of Article 51 of the Charter and that States would be entitled to use force in the exercise of the right of self-defence if their nationals' lives were at stake. Other members who supported the second view took no position on the issue of the use of force. Members who took the view that the issues discussed in article 2 had no place in the topic of diplomatic protection and should therefore be deleted, did not agree with the retention of the first part of the opening clause since in their view the use of force to protect nationals was a form of self-help distinct from diplomatic protection at any level, either legal or factual. For that reason, even the retention of that part of article 2 would create confusion.

438. Another view advanced was that the articles should make it clear that diplomatic protection was the initiation of a procedure for the peaceful settlement of a dispute, in order to protect the rights or property of a national who had been threatened with or had suffered injury in another State. In that way, force was excluded without recourse to the wording in the first sentence of draft article 2. Thus a constructive solution worth considering might consist in deleting the term "action" from article 1 and instead stating that diplomatic protection meant the initiation of a procedure for the peaceful settlement of a dispute.

(c) Special Rapporteur's concluding remarks

439. As far as article 2 was concerned, it had to be acknowledged that the use of force was construed by some States as the ultimate form of diplomatic protection. Support for this position was to be found in the literature both before and after the Second World War. It was a fact that States had, on a number of occasions, forcibly intervened to protect their nationals, arguing that they were exercising the right to diplomatic protection and that they would continue to do so in future. In all honesty, he could not, like his predecessor, contend that the use of force was outlawed in the case of the protection of nationals. He had, however, attempted to subject such intervention to severe restrictions. Some members had rejected draft article 2 on the grounds that the Charter of the United Nations prohibited the use of force to protect nationals absolutely and that such use was justified only in the event of an armed attack. However, other members of the Commission had not taken a position on the Charter provisions, preferring to reject article 2 on the ground that it simply did not belong to the subject of diplomatic protection. The debate had revealed that there was no unanimity on the meaning of the term "diplomatic protection", but it had also shown that diplomatic protection did not include the use of force. It was thus quite clear that draft article 2 was not acceptable to the Commission.

4. Article 3[102]

(a) Introduction by the Special Rapporteur

440. The Special Rapporteur stated that the question whether the right of protection was one pertaining to the State or to the individual was addressed in article 3. At the present stage, it was sufficient to say that historically that right was vested in the State of nationality of the injured

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[102] Article 3 reads:

Article 3

> The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

A/CN.4/506, p. 22.

individual. The fiction that the injury was to the State of nationality dated back to the eighteenth century and Vattel, and had been endorsed by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions*[103] and the *Panevezys-Saldutiskis Railway*[104] cases, and also by the International Court of Justice in the *Nottebohm* case.

441. Article 3 was relatively uncontroversial. It raised the issue of whose right was asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. The traditional view that the injury was caused to the State itself had been challenged on the grounds that it was riddled with internal inconsistencies. As he had already pointed out, the doctrine had been accepted for centuries and had been endorsed by the Permanent Court of International Justice and by the International Court of Justice.

442. Diplomatic protection, albeit premised on a fiction, was an accepted institution of customary international law that continued to serve as a valuable instrument for the protection of human rights. It provided a potential remedy for the protection of millions of aliens who had no access to remedies before international bodies and a more effective remedy for those who had access to the often ineffectual remedies embodied in international human rights instruments.

443. Article 3 attempted to codify the principle of diplomatic protection in its traditional form. It recognized diplomatic protection as a right attached to the State, which the State could exercise at its discretion, subject to article 4, whenever a national was unlawfully injured by another State. The right of diplomatic intervention of the State of nationality was not limited to instances of large-scale and systematic human rights violations, nor was the State obliged to refrain from exercising that right when the individual enjoyed a remedy under human rights or foreign investment treaties. In practice, a State would probably refrain from asserting its right when the person did have an individual remedy, or it might join the individual in asserting his right under the treaty in question. In principle, according to article 3, a State was not obliged to exercise such restraint, as its own right was violated when its national was unlawfully injured.

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[103] 1924, P.C.I.J. Series A, No. 2.

[104] 1924, P.C.I.J. Series A/B, No. 76.

(b) Summary of the debate

444 The proposition in article 3 was in principle found to be acceptable but a number of difficulties were found with its formulation. The article adhered closely to the traditional doctrine of diplomatic protection with the core of article 3 contained in the words "on behalf of a national unlawfully injured by another State". Members suggested it would be more appropriate to replace the final phrase with the words "injured by the internationally wrongful act of another State", which would have the advantage of keeping the subject matter within its proper bounds, namely, that of international responsibility. More importantly, in terms of traditional theory, it was not the individual who was injured, but the State which suffered damage in the person of its national. That was where the traditional fiction lay and this should be maintained consistently in the draft articles.

445. It was stressed that the very welcome step in international law of recognizing direct individual rights, in the context either of the protection of human rights or the protection of investments, had not undermined the traditional doctrine of diplomatic protection. Diplomatic protection was a discretionary power of the State under existing positive international law - and that should perhaps be stated more explicitly. The question arose whether the time had come to confine the State's discretionary power within narrower bounds. The view was also expressed that it was not appropriate to keep the phrase declaring that the right to exercise diplomatic protection was of a discretionary nature, since some might argue that such language precluded States from enacting internal legislation that obliged States to protect their nationals.

(c) Special Rapporteur's concluding remarks

446. In article 3, he had proposed that the Commission should adopt the traditional view deriving from the judgement of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, according to which diplomatic protection was a right of the State, which did not act as the agent of its national. Some members had said that the State's claim should be more strongly emphasized. Others had taken the view that greater emphasis should be placed on the fact that the injury to the national was the cause of the breach of international law. He believed that the idea was implicit in the draft article, but agreed that it could be made more explicit.

5 Article 4[105]

(a) Introduction by the Special Rapporteur

447 The Special Rapporteur stated that article 4 dealt with another controversial question and was a proposal *de lege ferenda* in the field of progressive development, not codification According to the traditional doctrine, a State had an absolute right to decide whether or not to exercise diplomatic protection on behalf of its national It was under no obligation to do so Consequently, a national injured abroad had no right to diplomatic protection under international law In the opinion of some scholars, that position was an unfortunate feature of international law and current developments in international human rights law required that a State be under some obligation to accord diplomatic protection to an injured individual The matter had been discussed in the Sixth Committee, where most speakers had expressed the view that the State had absolute discretion whether to grant diplomatic protection Nevertheless, some speakers had argued to the contrary

448 State practice in that field was interesting Many States had Constitutions indicating that the individual did have a right to diplomatic protection Some Constitutions contained wording

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[105] Article 4 reads

Article 4

1 Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State

2 The State of nationality is relieved of this obligation if

(a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people,

(b) Another State exercises diplomatic protection on behalf of the injured person,

(c) The injured person does not have the effective and dominant nationality of the State

3 States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority

Ibid , p 27

to the effect that the State had to protect the legitimate rights of its nationals abroad or that the nationals of the State should enjoy protection while residing abroad. He did not, however, know whether those rights were enforceable under the municipal law of those countries or were simply intended to ensure that a national injured abroad had the right of access to the State's consular officials.

449. Paragraphs 89 to 93 described the restrictions that should be imposed on that right. First, it was a right that should be limited to the violation of *jus cogens* norms. Second, the national State should have a wide margin of appreciation and should not be compelled to protect a national if its international interests dictated otherwise. Third, a State should be relieved of that obligation if the individual had a remedy before an international tribunal. Fourth, a State did not have that obligation if another State could protect an individual with dual or multiple nationality. Finally, he had put forward the idea that a State should be under no obligation to protect a national who had no genuine or effective link with the State of nationality, that being an area where the *Nottebohm* test might apply. He was therefore bringing article 4 to the Commission's attention in the full realization that it was an exercise in progressive development. Again, the Commission should decide at an early stage whether the proposal was too radical.

(b) Summary of the debate

450. Some members of the Commission expressed concern about article 4 which they found to be *de lege ferenda* and not supported by evidence in State practice. The constitutional provisions mentioned in paragraphs 80 and 81 of the report of the Special Rapporteur provided no evidence of *opinio juris*. There were not very many contemporary writers who thought that diplomatic protection was a duty of the State and the conclusion reached in paragraph 87 that there were "signs" in recent State practice of support for that viewpoint was an optimistic assessment of the actual materials available.

451. In the same vein, it was stated that article 4 went much too far in establishing a duty for the State to exert diplomatic protection in certain circumstances, while not indicating to whom the duty was owed. It might be to the individual, but because reference had also been made to peremptory norms, the question arose as to whether the duty was owed to the international community as a whole. It was stated that diplomatic protection was a sovereign prerogative of the State, exercised at its discretion. National legislation at best spelled out the objectives of State policy in terms of affording protection to a State's nationals abroad, but failed to establish binding legal provisions.

452. It was stated that this article like articles 1 and 3 raised the question of human rights. Diplomatic protection was clearly not recognized as a human right and could not be enforced as such. It was stressed again that a distinction must be made between human rights and diplomatic protection, since, if the two were confused, more problems might be raised than solved. In addition, in view of the lack of clear understanding of the meaning and the scope of "*jus cogens*", the article created great difficulties. In accordance with this view, the Commission should confine itself to the strictly technical concept of the institution of diplomatic protection and should not venture beyond its mandate.

453. It was further noted that the articles set forth a "legal duty" for a State to exercise diplomatic protection but that that duty was limited to when such a request was made by the injured person. Therein lay a contradiction: if the State had a duty, then it had to perform it - otherwise it was committing a wrongful act. In article 4, the "request" from the injured persons was linked exclusively to a grave breach of *jus cogens*, but that formulation radically diminished the scope of the right to diplomatic protection. It implied that a State was obliged to intervene only when *jus cogens* was involved. The intention was perhaps that, when a rule of *jus cogens* was breached, a State should intervene regardless of the circumstances, and indeed more effectively, dutifully and readily than in other situations. This formulation contradicted the principles of State responsibility under which, if *jus cogens* was affected, not only the State of nationality, but all States, had the right and the duty to protect the individual.

454. Another question raised in the context of this article was the extent to which the individual could pursue his or her own claims and whether the right to diplomatic protection could be exercised simultaneously. The precise point at which the State should exercise the right of diplomatic protection, and if it did, the extent to which the individual continued to be a player in the game, needed further attention. The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens suggested that the State's claim should be given priority. Did that mean that the national's claim would no longer be addressed, or if it was, that it would no longer be the focus of the resolution of the claim? Again, the interrelationship of two claims that could run concurrently was not made clear.

455. Some other members of the Commission took a less critical view of article 4. In their view, the article basically stated that, in the event of a grave breach of an obligation of crucial importance for the safeguarding of the fundamental interests of the international community as a whole, a State could not remain passive, i.e. if genocide was committed somewhere or if a State

systematically resorted to torture or racial discrimination as a means of governance, other States could not stand idly by. But that issue was also not one of diplomatic protection. It was a far more general issue and one with which the members of the Commission were familiar, since it related to international crimes. In such circumstances, States not only had the right, but also the duty to act, although there was still no justification for the use of force. However, that did not mean that diplomatic protection should serve as the instrument for such action, because it was not the rights and interests of nationals alone that were to be endorsed, but those of the international community as a whole. The issue came not under diplomatic protection, but under the far broader topic of State responsibility - and more particularly under article 51 of the draft articles on State responsibility adopted on first reading.

(c) Special Rapporteur's concluding remarks

456. The Special Rapporteur recognized that he had introduced article 4 *de lege ferenda*. As already indicated, the proposal enjoyed the support of certain writers, as well as of some members of the Sixth Committee and of the International Law Association; it even formed part of some Constitutions. It was thus an exercise in the progressive development of international law. But the general view was that the issue was not yet ripe for the attention of the Commission and that there was a need for more State practice and, particularly, more *opinio juris* before it could be considered.

6. Article 5[106]

(a) Introduction by the Special Rapporteur

457. The Special Rapporteur said that article 5 in essence examined the principle stated in the *Nottebohm* case, namely, that there should be an effective link between the State of nationality and the individual for the purpose of the exercise of diplomatic protection. The question was whether that principle accurately reflected customary law and whether it should be codified.

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[106] Article 5 reads:

Article 5

> For the purposes of diplomatic protection of natural persons, the "State of nationality" means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization.

Ibid., p. 34.

The *Nottebohm* case was seen as authority for the position that there should be an effective link between the individual and the State of nationality, not only in the case of dual or plural nationality, but also where the national possessed only one nationality. Two factors might, however, limit the impact of the decision in the case and make it an atypical decision. First, doubts remained about the legality of Liechtenstein's conferral of nationality on Nottebohm under its domestic law. Secondly, Nottebohm had certainly had closer ties with Guatemala than with Liechtenstein. He therefore believed that the International Court of Justice had not purported to pronounce on the status of Nottebohm's Liechtenstein nationality vis-a-vis all States. It had carefully confined its judgment to the right of Liechtenstein to exercise diplomatic protection on behalf of Nottebohm vis-a-vis Guatemala and had therefore left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a State other than Guatemala.

458 With regard to the application of the principle, little information on State practice was available and academic opinion was divided. Acceptance of the principle would seriously undermine the scope of diplomatic protection because in the modern world, as a result of globalization and migration, many people who had acquired the nationality of a State by birth or descent had no effective link with that State. That was why he thought that the genuine link principle must not be applied strictly and that a general rule should not be inferred from it. His proposed draft article 5 therefore stated that "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization." It drew on two fundamental principles that governed the law of nationality. First, a State's right to exercise diplomatic protection was based on the link of nationality between it and the individual; secondly, it was for each State to determine under its own law who its nationals were. It also took account of the fact that, far from being absolute, the right of a State to exercise diplomatic protection on behalf of a national was a relative one, as demonstrated by doctrine, case law, international custom and the general principles of law (paras. 95 to 105 of the report). Birth and descent were deemed to be satisfactory connecting factors for the conferment of nationality and the recognition of nationality for the purposes of diplomatic protection. The same was true, in principle, for the conferment of nationality through naturalization, whether automatically by operation of law in the cases of marriage and adoption or on application by the individual after fulfilling a residence requirement. On the other hand, international law would not recognize

fraudulently acquired naturalization, naturalization conferred in a discriminatory manner or naturalization conferred in the absence of any link whatsoever between the State of nationality and the individual. In that case, abuse of right on the part of the State conferring nationality would render the naturalization *mala fide*. There was, however, a presumption of good faith on the part of the State, which had a margin of appreciation in deciding upon the connecting factors that it considered necessary for the granting of its nationality.

(b) Summary of the debate

459. It was stated that the report contained a great deal of helpful material, especially on the relevant jurisprudence and the decisions adopted in specialized jurisdictions like the Iran-United States Claims Tribunal and the United Nations Compensation Commission. However, article 5, which based the right of diplomatic protection on nationality, did not take account of certain political and social realities. For example, in many traditional societies, no provision was made for the registration of births and, in such societies, large numbers of illiterate people would be hard pressed to prove their nationality. There was also the case of victims of war and refugees who crossed borders precipitately and generally without travel documents and who were able to provide oral evidence only of their State of origin. For such people, to demand proof of nationality, particularly documentary proof, was clearly meaningless. In that sense, the principle of "effective nationality" was useful in providing a basis for the evidence of nationality that would otherwise not be available. However, the position of the Special Rapporteur on this point seemed to be a little unclear. After taking the prudent position in his comments on article 5 (para. 117) that "The genuine link requirement proposed by *Nottebohm* seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of people from the benefit of diplomatic protection", he then went back to that principle in the commentary to articles 6 and 8, giving it a large and positive role. In State practice, there was constant reference to residence, not nationality, as the connecting factor that should be taken into consideration in the settlement of disputes. In the real world, residence would provide a basis for diplomatic protection which would otherwise be impossible to prove by normal documentation.

460. Some members insisted that the right of diplomatic protection should not be linked too much to nationality. Today, with increased frequency, nationals establish residence abroad. The place of residence, therefore, created a link with the host State that was just as effective as

nationality. Even if that was a step beyond traditional doctrine, it was a fact of modern-day life that the Commission should take into account. In the consideration of articles 5 to 8, residence should be considered not just as an accessory factor, but as an actual linking factor.

461. The view was also expressed, however, that the importance of "habitual residence", as some members had suggested, should not be overemphasized in the context of diplomatic protection. Otherwise the question would arise as to whether a person's habitual residence in a State would give that State the right to exercise diplomatic protection even if that person possessed another nationality *jure soli* or *jure sanguinis* or through bona fide naturalization. The situation would be different if the person concerned was stateless or a refugee, an issue that was addressed in article 8. The other question that would arise was whether a State whose nationality a natural person had acquired through *jus soli*, *jus sanguinis* or naturalization lost the right to diplomatic protection if the person concerned habitually resided in another country. According to the members holding this view the answer to these questions was in the negative, as otherwise habitual residence would become the natural enemy of diplomatic protection.

462. The comment was made that while nationality was relevant to the topic, it was not the core of the topic. Article 5 did not attempt to provide comprehensive coverage of the rules of international law concerning nationality. But it would provide a basis for a State to challenge another State's conferral of nationality on an individual. The Special Rapporteur had rightly noted the sensitivity of States to any suggestion of impropriety in the exercise of what they regarded as their sovereign prerogative: that of granting nationality to individuals. It would, accordingly, be advisable to follow the safe course taken by the International Court of Justice in the *Nottebohm* case and to assume that States were free to grant nationality to individuals. The question of whether a given individual had or did not have the nationality of a certain State was one that implied the application of that State's legislation and was best left to the State's own determination. According to the *Nottebohm* judgment, the way to approach the nationality requirement was to allow other States, if they so wished, to challenge the existence of an effective link between a State and its national. It was noted that the Special Rapporteur had correctly pointed out, that there were few examples in State practice of challenges to the effectiveness of nationality. There were even fewer examples, however, of States challenging the way in which nationality had been granted by another State. The number of cases that illustrated one or another approach was not decisive: rather, it had to be ascertained whether States to which a claim was presented felt entitled to use lack of effectiveness as an objection.

463 If the Commission retained the effectiveness test, it was pointed out, it should introduce some restrictions so as to make it workable. It should consider whether the lack of effectiveness of an individual's nationality was open to challenge by any other State, or whether it was only open to a State that had the most significant links with the individual to contend that there were no genuine links with the claimant State. In the *Barcelona Traction* case which concerned a corporation, not an individual, the International Court of Justice had nonetheless referred to the *Nottebohm* test. Although it had not endorsed that test, the Court had considered whether it applied in respect of Canada and had concluded that there were sufficient links between *Barcelona Traction* and Canada. On the other hand, it had not compared these links with those of Spain, where the subsidiary companies operated, or of Belgium, of which the majority of shareholders were nationals. Diplomatic protection was based on the idea that the State of nationality was specially affected by the harm caused or likely to be caused to an individual. It was not an institution designed to allow States to assert claims on behalf of individuals, in general but on behalf of the State's own nationals. The existence of a genuine link between the individual and a State other than the State of nationality was an objection that a State could raise if it wanted to, irrespective of whether such a stronger link existed with that State itself. If there was no genuine link, the State of nationality was not specially affected.

464 It was said that article 5 was closely related to article 3 and set out the definition of a national, rather than of the State of nationality. The criteria for granting nationality - birth, descent or naturalization - were appropriate and generally accepted. Just one of those criteria was enough to establish an effective link between the State of nationality and its national, even if the national habitually resided in another State. With regard to habitual residence it was said that some writers drew a distinction between involuntary and voluntary naturalization, depending on whether a nationality was acquired by adoption, legitimation, recognition, marriage or some other means. Naturalization itself, even when limited by the Special Rapporteur to bona fide naturalization, remained a very broad concept, which assumed different forms based on different grounds. Among those grounds, habitual residence often played an important role, albeit generally in combination with other connecting factors.

465 The "bona fide" criterion, however, was considered by some members to be subjective and consequently difficult to apply. It was pointed out that the requirement of "bona fide" would place the onus of proof of bad faith on the respondent State and that would be unfair. Instead, it

Flegenheimer case. It was further suggested that the article might be shortened by deleting references to the words "by birth, descent or by bona fide naturalization". Others suggested that these words be retained but that the phrase "in accordance with international law" be added to qualify naturalization. This was unacceptable to some members who argued that the retention of any reference to the methods of granting of nationality questioned the discretion of the State to confer nationality in accordance with its national laws.

466. It was further stated that the listing of the requirements for the acquisition of nationality in article 5, as opposed to article 1, gave the impression that a State's right to grant nationality was being questioned and that States were not entitled to grant nationality on what were not bona fide grounds. It was stressed that what was in issue was opposability rather than nationality. Viewed in this light, the question of bona fide nationality, the *Nottebohm* case and other issues fell into place. The *Nottebohm* case was not about the right of a State to grant nationality but about the right of Liechtenstein to file a claim against Guatemala. Hence, according to this view, paragraphs 97, 98, 101 and 102 of the report of the Special Rapporteur, should be discussed in the context of opposability rather than that of a State's right to grant nationality, which was virtually absolute. Consequently, the conclusion drawn in paragraph 120 of the report of the Special Rapporteur should be modified accordingly.

467. The comment was also made that the statement in paragraph 117 of the report to the effect that the genuine link requirement proposed by *Nottebohm* seriously undermined the traditional doctrine of diplomatic protection was over stated. On the contrary, as long as an individual had the nationality of a State, on the basis of one of the criteria in question, the door was open for the exercise of diplomatic protection by that State. In addition, the statement in paragraph 104 of the report of the Special Rapporteur that nationality was not recognized in the case of forced naturalization while pertinent, appeared not to take account of State succession, an institution which accorded to the successor State the right to grant its nationality *en masse* and by operation of law, even to persons who held the nationality of the predecessor State and whose habitual residence was in the territory of the State that was the subject of the succession. It was an important exception and was recognized in international law on the same grounds as voluntary naturalization.

468. Some members of the Commission expressed the view that it would be difficult to discuss article 5 in the absence of reference to the questions of denial of justice and the

justice, i.e. there must be no further possibilities for obtaining reparation or satisfaction from the State to which the act was attributable. Once all local administrative and legal remedies had been exhausted and if the injury caused by the breach of the international obligation had not been repaired, the diplomatic protection procedure could be started.

469. It was suggested that it was preferable for the draft articles to deal exclusively with the treatment of natural persons. Legal persons should be excluded from this study given the obvious difficulties in determining their nationality, which might be that of the State where a legal person had its headquarters or was registered, that of its stockholders or perhaps even that of the main decision-making centre.

470. Other members of the Commission, however, did not agree with the inclusion of denial of justice in the text since it would involve dealing with primary rules and the Commission had already decided to limit the scope of the consideration of the topic to secondary rules. With regard to the question of whether the topic should be limited to natural persons, some members of the Commission felt that issue should not be foreclosed at this time, taking into account the expansion of international trade; nationals in need of diplomatic protection would be shareholders of companies.

(c) Special Rapporteur's concluding remarks

471. The Special Rapporteur stated that, as many members of the Commission had emphasized, the topic under consideration dealt with diplomatic protection, and not acquisition of nationality. Article 5 perhaps failed to make that distinction clearly enough. The real issue was whether a State of nationality lost the right to protect an individual if that individual habitually resided elsewhere. What was involved was a challenge to the right of a State to protect a national, not the circumstances in which a State could grant nationality. Opposability of nationality came into play and that should be addressed in the redrafting of the article. He agreed with the suggestion to redraft article 5 to remove references to birth, descent and naturalization. Objections had been raised to the use of the term "bad faith", and that, too, was a question of drafting. Thus, although many suggestions had been made on how to improve article 5, no one had questioned the need for such a provision. With regard to the requirement of exhaustion of local remedies, the Special Rapporteur agreed that it was a matter that must be dealt with in the work on diplomatic protection, even if it was also being addressed under the topic of State responsibility.

7. Article 6[107]

(a) Introduction by the Special Rapporteur

472. Article 6 dealt with the institution of dual or multiple nationality, which was a fact of international life, even if not all States recognize the institution. The question was whether one State of nationality could exercise diplomatic protection against another State of nationality on behalf of a dual or multiple national. Codification attempts, State practice, judicial decisions and scholarly writings were divided on the subject, as demonstrated in the report (paras. 122 to 159), but the most recent sources seemed to support the rule advocated in article 6: subject to certain conditions, a State of nationality could exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national where the individual's dominant nationality was that of the first State. The criterion of dominant or effective nationality was important and courts were required to consider carefully whether the person concerned had closer links with one State than with another.

(b) Summary of the debate

473. Different views were expressed in respect of article 6. Some members supported the principle of the article and the inclusion of a reference to "dominant and effective" nationality. Some had difficulties with the core proposition of the article. While yet other members expressed views in regard to specific aspects of the formulation of the article.

474. Some members declared that notwithstanding the classical rule of the non-responsibility of the State in respect of its own nationals, article 6 should be endorsed for the reasons given by the Special Rapporteur in the report. Although, as pointed out in paragraph 153, there might be problems in determining the issue of effective or dominant nationality, it was nevertheless possible to do so. As between two States of nationality, the claimant State would in practice

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[107] Article 6 reads:

Article 6

> Subject to article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Ibid., p. 42.

carry the day if the balance of nationality was manifestly in its favour. Any doubt about the existence of effective or dominant nationality between the claimant State and the respondent State should be resolved in favour of the respondent State.

475. Those members who supported article 6 noted that "dominant" nationality and "effective" nationality were treated in the case law as interchangeable. Some preference was expressed for the concept of "dominant nationality" because it implied that one of the two nationality links was stronger than the other. The expression "effective nationality", on the other hand, could mean that neither of the links of nationality would suffice to establish the right of a State to exercise diplomatic protection. In the case of a person having dual nationality, for example, it could be maintained that neither of the links of nationality was effective. It would then follow that neither State could exercise diplomatic protection. The Special Rapporteur said that he supported the members who preferred the word "dominant" rather than the word "effective" because it was a question of comparing the respective links that an individual had with one State or another. However, he did not fully endorse the reasons given for that preference because nationality acquired through birth might well be effective nationality: it depended on how far the meaning of the word "effective" was to be stretched.

476. Other members supported the rule of non-responsibility of States in respect of their own nationals and raised several arguments in favour of this rule. Particular emphasis was placed on article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws - was opposed to this view, since it stated that "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". It was not legitimate for a dual national to be protected against a State to which he/she owed loyalty and fidelity.

477. These members acknowledged that the development of the principle of dominant or effective nationality had been accompanied by a significant change in approach to the question of the exercise of diplomatic protection on behalf of persons with dual or multiple nationality. The Special Rapporteur had given many examples, mainly judicial decisions, ranging from the *Nottebohm* case to the jurisprudence of the Iran-United States Claims Tribunal, of the application of the principle of dominant or effective nationality in cases of dual nationality. His conclusion in paragraph 160 of the report was that "[t]he principle contained in article 6 therefore reflects the current position in customary international law and is consistent with developments in international human rights law, which accords legal protection to individuals even against the

State of which they are nationals". However, the situation was not so simple. As the Special Rapporteur indicated himself in paragraph 146 of his report, jurists were divided on the applicability of the principle of dominant nationality. It was stated that while States were now more tolerant of multiple nationality than 30 to 50 years ago, many still incorporated in their internal legislation the rule contained in article 3 of the 1930 Hague Convention, namely, that "a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses". Notwithstanding the *Nottebohm* case, which continued to be perceived as the fundamental point of reference, the principle of the sovereign equality of States continued to enjoy strong support. In cases in which dual nationality was well established, any indiscriminate application of the principle of dominant or effective nationality could have absurd implications and might undermine State sovereignty. In addition, dual nationality conferred a number of advantages on those who held two nationalities and the question was raised why they should not suffer disadvantages as well.

478. It was stressed that the principle of dominant or effective nationality had its place in cases of dual nationality when diplomatic protection was exercised by one of the States of nationality of the person concerned against a third State. However, when it came to applying the principle against another State of nationality of the person concerned, there was as yet insufficient support in customary international law for the codification of such a rule. Furthermore, if draft article 6 was to be addressed in the context of the progressive development of international law, the key factor in determining whether a State of nationality could exercise diplomatic protection against another State of nationality should not be the dominant nationality of the claimant State, but, rather, the lack of a genuine and effective link between the person concerned and the respondent State.

479. Supporters of article 6 reiterated that article 6 reflected current thinking in international law and rejected the argument that dual nationals should be subjected to disadvantages in respect of diplomatic protection because of the advantages they might otherwise gain from their status as dual nationals.

(c) Special Rapporteur's concluding remarks

480. The Special Rapporteur acknowledged that article 6 presented great difficulties and had created a clear division of opinion. He agreed it would be more appropriately placed after article 7. He did not, unlike some members, see it as a clear case of progressive development of international law. Two points of view existed, both backed by strong authority, and it was for

the Commission to make a choice between the competing principles He stressed that many States did not allow a national to denounce or lose his or her nationality Cases might occur in which a person had relinquished all ties with the State of nationality and acquired the nationality of another State yet was formally bound by a link of nationality with the State of origin It would mean that, if the individual was injured by the State of origin, the second State of nationality could not provide protection Clearly, the draft must contain a provision covering the material in article 6

8 Article 7[108]

(a) Introduction by the Special Rapporteur

481 The Special Rapporteur stated that article 7, which dealt with the exercise of diplomatic protection on behalf of dual or multiple nationals against third States, namely, States of which the individual was not a national, provided that any State of nationality could exercise diplomatic protection without having to prove that there was an effective link between it and the individual It was a compromise rule, against a background of differing opinions, backed up by the decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission

(b) Summary of the debate

482 Many members in principle supported article 7 The view was expressed that article 7, paragraph 1, merely reflected the contents of article 5 without adding anything more Support was expressed for the Special Rapporteur's view that the effective or dominant nationality principle did not apply where one State of nationality sought to protect a dual national against another State of which he was not a national Support was further expressed for the proposition

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[108] Article 7 reads

Article 7

1 Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national

2 Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national

Ibid , p 54

in paragraph 170 of the report of the Special Rapporteur that the conflict over the requirement of an effective link in cases of dual nationality involving third States was best resolved by requiring the claimant State only to show that a bona fide link of nationality existed between it and the injured person.

483. Concern was, however, expressed that the Special Rapporteur seemed to reject the principle of dominant or effective nationality that he had sought to apply in article 6. In paragraph 173 of his report, the Special Rapporteur recognized that the respondent State was entitled to raise objections where the nationality of the claimant State had been acquired in bad faith. According to this view, the bona fide link of nationality could not totally supplant the principle of dominant or effective nationality as set forth in article 5 of the 1930 Hague Convention and confirmed by subsequent jurisprudence, including the *Nottebohm* judgment. Of course, the question arose as to whether the concept of bona fides should be interpreted in broad or narrow terms in the context of this article. The Special Rapporteur, however, appeared to have adopted a strictly formal approach to nationality, without considering whether an effective link existed between the person concerned and the States in question. On that point, according to this view, while the principle of dominant nationality might well be set aside, an escape clause should nevertheless be inserted in article 7 to prevent the article from being used by a State to exercise diplomatic protection on behalf of a person of multiple nationality with whom it had no effective link.

484. With regard to paragraph 2, the comment was made that the concept of joint exercise of diplomatic protection by two or more States of nationality was acceptable. Nevertheless, provision should be made, in either article 7 or the commentary, for the possibility of two States of nationality exercising diplomatic protection simultaneously but separately against a third State on behalf of a dual national. In such a case, the third State must be able to demand the application of the dominant nationality principle in order to deny one of the claimant States the right to diplomatic protection. Difficulties might also arise if one State of nationality waived its right to exercise diplomatic protection or declared itself satisfied by the response of the responding State, while the other State continued with its claim.

(c) Special Rapporteur's concluding remarks

485. The Special Rapporteur noted that there was widespread support for article 7, some helpful drafting suggestions had been made and the principle set out in the article had not been seriously questioned.

9. Article 8[109]

(a) Introduction by the Special Rapporteur

486. The Special Rapporteur stated that the rule set out in article 8, which concerned the exercise of diplomatic protection on behalf of stateless persons and refugees, was an instance of the progressive development of international law. It clearly departed from the traditional position stated in the *Dickson Car Wheel Company v. United Mexican States*.[110] A number of conventions had been adopted on stateless persons and refugees, particularly since the Second World War, but they did not deal with the question of diplomatic protection. Many writers had suggested that that was an oversight which should be remedied because some State must be in a position to protect refugees and stateless persons. The appropriate State was the State of residence, given that residence was an important aspect of the individual's relationship with the State, as demonstrated by the jurisprudence of the Iran-United States Claims Tribunal. The question remained whether the Commission was ready to follow that course.

(b) Summary of the debate

487. It was generally agreed that article 8 represented progressive development of international law. But such a progressive development of international law was warranted by contemporary international law, which could not be indifferent to the plight of refugees and stateless persons. Article 8 reaffirmed the role of the institution of diplomatic protection in achieving a basic goal of international law, that of civilized co-existence based on justice, and demonstrated in exemplary fashion how the Commission could, at the right time and in an appropriate context, fulfil one of its primary tasks, that of the progressive development of international law. The problem of the protection of stateless persons and refugees was extremely pertinent, for people in those categories numbered many millions worldwide. It was suggested that there were alternatives to nationality that should be taken into account in particular

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[109] Article 8 proposed by the Special Rapporteur reads:

> A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?], provided the injury occurred after that person became a legal resident of the claimant State.

A/CN.4/506, p. 57.

[110] 4 R.I.A.A.

circumstances, and the case of refugees and stateless persons was certainly something that demanded careful consideration. It was necessary to see whether a parallel with nationality could be drawn when habitual residence was involved.

488. Some members, however, questioned the validity of article 8. According to this view, although human rights conventions afforded stateless persons and refugees some protection, most States of residence did not intend to extend diplomatic protection to those two groups. A number of judicial decisions stressed that a State could not commit an internationally wrongful act against a stateless person, and consequently, no State was empowered to intervene or enter a claim on his/her behalf. The 1951 Convention relating to the Status of Refugees made it clear that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic and consular authorities of the country of issue, nor did it confer on those authorities the right of protection. The 1961 Convention on the Reduction of Statelessness was silent on the subject of protection. In spite of the developments in recent years relating to the protection of refugees and stateless persons, the time did not yet seem ripe to address the question of diplomatic protection for such persons.

489. Some members expressed concern about article 8 if diplomatic protection was to be considered the right of an individual vis-a-vis the State entitled to accord him or her diplomatic protection, since that would impose an additional burden on States of asylum or States hosting refugees and stateless persons. The problem in connection with the protection of refugees was that the better could become the enemy of the good. If States believed that the granting of refugee status was the first step towards the granting of nationality and that any exercise of diplomatic protection was in effect a statement to the individual that the granting of refugee status implied the granting of nationality, that would be yet another disincentive to the granting of refugee status. Refugee status in the classical sense of the term was an extremely important weapon for the protection of individuals against persecution or well-founded fear of persecution. If the Commission overloaded the burden, the serious difficulties that already existed in maintaining the classical system would be exacerbated. However, if diplomatic protection was to be conceived as being at the discretion of the State and not as the right of the individual, then the article, with some modification relating to the conditions under which such protection might be exercised, would be more acceptable to these members. Some members, while sympathizing with those who had expressed fears that the option offered to host States might, in practice, turn into a burden, nevertheless felt that States of residence should not be denied the right to exercise

diplomatic protection on behalf of stateless persons or refugees on their territory. Such a right might not be exercised very frequently, but it should not be generally withheld. Subject to dividing article 8 into two separate provisions dealing with stateless persons and refugees respectively, these members were in favour of maintaining the Special Rapporteur's text.

490. It was stressed by one speaker that when a host State felt compelled by moral or practical considerations to sponsor the claims of persons in its territory, vis-à-vis third States, such action could not be viewed as a legal duty but as a discretionary course of action. This member was confident that the Special Rapporteur had at no stage suggested that the granting of refugee status was the penultimate step in the process of granting a right of nationality. A State could, for humanitarian reasons, espouse certain claims of refugees, placing them on the some footing as nationals, because there was no one else to take up their cause.

491. With regard to the issue of residence, some members found it useful to require that the refugee or the stateless person must have been residing for a certain period of time in the host country before requesting diplomatic protection. Other members, however, preferred the requirement of "effective link".

492. Some members contended that diplomatic protection should not be exercised against the State of nationality of the refugee in respect of claims relating to matters arising prior to the granting of refugee status, but they accepted that there should be no hesitation with regard to claim against the State of nationality arising after the refugee had been granted such status.

493. Members who were concerned about the burden that diplomatic protection for refugees might place on the host State suggested that the United Nations High Commissioner for Refugees should provide "functional" protection for refugees in the same way that international organizations provided functional protection to their staff members.

(c) Special Rapporteur's concluding remarks

494. The Special Rapporteur stated that article 8 was clearly an exercise in the progressive development of international law and an overwhelming majority of members had expressed support for it. The objections raised were not really well founded. First, the host State reserved the right to exercise diplomatic protection and thus had a discretion in the matter. Second, there was no suggestion that the State in which the individual had obtained asylum could bring an action against the State of origin. That was made very plain in paragraphs 183 and 184 of his report, although it could perhaps be made clearer in the article itself. Third, the provision was not likely to be abused: stateless persons and refugees residing within a particular State were

unlikely to travel abroad very often, as the State of residence would be required to give them travel documents, something that in practice was not done frequently. Only when a person used such documents and had suffered injury in a third State other than the State of origin would diplomatic protection need to be exercised. A number of suggestions for improvements had been made, including the suggestion that the article should be split into one part on stateless persons and another on refugees.

10. Report of the Informal Consultations

495. At its 2624th meeting, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on articles 1, 3 and 6. The report of the Informal Consultations is reproduced below:

A. Most of the discussions, in Informal Consultations, focused on article 1 which seeks to describe the scope of the study.

1. It was agreed that article 1 should not include reference to denial of justice and that no attempt would be made to draft a substantive provision on this subject as it is essentially a primary rule. On the other hand, it was agreed that denial of justice should be mentioned as an example of an internationally wrongful act in the commentary to article 1. Moreover, it was stressed that elements of the concept should be considered in the provision on exhaustion of local remedies.

2. It was agreed that there should not be an exclusionary clause attached to article 1. On the other hand, the commentary should make it clear that the draft articles would not cover the following issues:

(a) functional protection by international organizations;

(b) the protection of diplomats, consuls and other State officials acting in their official capacity;

(c) diplomatic and consular immunities;

(d) the promotion of a national's interest not made under a claim of right.

3. It was agreed that the draft articles would - at this stage - endeavour to cover the protection of both natural and legal persons. Consequently, article 1 would simply refer to "national", a term wide enough to include both types of persons. The protection of legal persons does, however, raise special problems and it is accepted that the Commission might at a later stage wish to reconsider the question whether to include the protection of legal persons.

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4. It was suggested that the inclusion of a reference to "peaceful" procedures in article 1 might obviate the need for an express prohibition on the use of force (see article 1 below).

It is recommended that the following options for article 1, reflecting the discussions that took place in the Informal Consultations, should be considered by the Drafting Committee.

OPTION ONE

(1) Diplomatic protection means a procedure taken by one State in respect of another State involving diplomatic action or judicial proceedings [or other means of peaceful dispute settlement?] [within the limits of international law?] in respect of an injury to a national caused by an internationally wrongful act attributable to the latter State.

(2) In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

OPTION TWO

Diplomatic protection is a process in which a State takes up the claim of its national, etc. etc. [thereafter substantially the same as Option one].

OPTION THREE

(1) Diplomatic protection is a process involving diplomatic or judicial action [or other means of peaceful dispute settlement] by which a State asserts rights on behalf of its nationals at the international level for injury caused to the national by an internationally wrongful act of another State vis-à-vis that State.

B. Article 3 gave rise to little debate. It is therefore recommended that the following article be referred to the Drafting Committee.

> The State of nationality has the right [is entitled?] to exercise diplomatic protection on behalf of a national [or non -national as defined in article 8] injured by an internationally wrongful act on the part of another State.

It was suggested that a reaffirmation of the right of a State to exercise diplomatic protection might be construed as an endorsement of the absolute discretion of the State to grant or refuse protection to a national. This would undermine efforts in municipal law to oblige States to exercise diplomatic protection on behalf of a national. Hence the word "entitled" instead of "right".

C. Article 6 was referred to informal consultations in order to resolve the division of opinion in the Commission on the question whether the dominant or effective State of nationality might exercise diplomatic protection vis-à-vis another State of nationality. The informal consultation group recognized that the "sources speak with mixed voices" but accepted that article 6 accorded with current trends in international law. It was, however, agreed that the Drafting Committee should consider including safeguards against an abuse of the principle contained in article 6. This might be done by

1. according greater prominence to the qualification contained in article 9 (4) insofar as it affects article 6;
2. emphasizing that the national should not have an effective link with the respondent State; and
3. including a definition of the term "dominant" or "effective" nationality in a separate provision.

It is recommended that article 6 be referred to the Drafting Committee.

Article 6

Subject to article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Article 9 (4)

Diplomatic protection may not be exercised by a new State of nationality against a previous State of nationality for injury incurred during the period when the person was a national only of the latter State.

D. No objections were raised to the referral of articles 5, 7 and 8 to the Drafting Committee. It is therefore recommended that articles 1, 3, 5, 6, 7 and 8 be referred to the Drafting Committee.

CHAPTER VI

UNILATERAL ACTS OF STATES

A. Introduction

496. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[111]

497. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic "Unilateral acts of States" and to indicate its scope and content.

498. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[112]

499. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño, Special Rapporteur on the topic.[113]

500. The General Assembly, in paragraph 8 of its resolution 52/156 endorsed the Commission's decision to include the topic in its agenda.

501. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.[114] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

502. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[115]

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[111] *Official Records of the General Assembly, Fifty-first session, Supplement No. 10* (A/51/10), p. 230 and pp. 328-329.

[112] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), paras. 196-210 and 194.

[113] Ibid., paras. 212 and 234.

[114] A/CN.4/486.

[115] *Official Records of the General Assembly, Fifty-third session, Supplement No. 10* (A/53/10), paras. 192-201.

503. The General Assembly, in paragraph 3 of its resolution 53/102 recommended that, taking into account the comments and observations of Governments, whether in writing or expressed fully in debates in the General Assembly, the Commission should continue its work on the topics in its current programme.

504. At its fifty-first session in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.[116] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral acts of States.

505. The Working Group reported to the Commission on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

506. The General Assembly, by paragraph 4 of its resolution 54/111 invited Governments to respond in writing by 1 March 2000 to the questionnaire on unilateral acts of States circulated by the Secretariat to all Governments on 30 September 1999 and by paragraph 6 of the same resolution recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the General Assembly, the Commission should continue its work on the topics in its current programme.

B. Consideration of the topic at the present session

1. Documents before the Commission and meetings devoted to the topic

507. At the present session the Commission had before it the Special Rapporteur's third report (A/CN.4/505). The Commission also had before it the report of the Secretary-General (A/CN.4/511) containing the text of the replies received to the questionnaire referred to in paragraphs 505 and 506 above.

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[116] A/CN.4/500 and Add.1.

508. In his third report, the Special Rapporteur examined some preliminary issues such as the relevance of the topic, the relationship between the draft articles on unilateral acts and the 1969 Vienna Convention on the Law of Treaties and the question of estoppel and unilateral acts. He then went on to reformulate articles 1 to 7 of the draft articles submitted in his second report. He proposed a new draft article 1 on definition of unilateral acts; proposed the deletion of the previous draft article 1 on the scope of the draft articles and decided against the advisability of including a draft article based on article 3 of the 1969 Vienna Convention on the Law of Treaties; proposed a new draft article 2 on the capacity of States to formulate unilateral acts, a new draft article 3 on persons authorized to formulate unilateral acts on behalf of the State and a new draft article 4 on subsequent confirmation of an act formulated by a person not authorized for that purpose. The Special Rapporteur also proposed the deletion of previous draft article 6 on expression of consent and, in that connection, examined the question of silence and unilateral acts. Finally, the Special Rapporteur proposed a new draft article 5 on the invalidity of unilateral acts.

509. The Commission considered the third report of the Special Rapporteur at its 2624th, 2628th to 2630th and 2633rd meetings between 19 May and 7 June 2000.

2. Introduction by the Special Rapporteur of his third report

510. The Special Rapporteur said that his third report consisted of a general introduction, in which he considered the possibility of basing the topic on the 1969 Vienna Convention on the Law of Treaties and referred to the links between unilateral acts and estoppel, and a proposed rewording of articles 1 to 7, as contained in his second report.

511. Unfortunately, when he had prepared the report, he had not yet received any reply from Governments to the questionnaire which was sent to them in September 1999 on their practice in respect of unilateral acts, although some of them had replied since.

512. The Special Rapporteur pointed out that everyone recognized the important role played by unilateral acts in international relations and the need to draw up precise rules to regulate their functioning. But such codification and progressive development was made more difficult by the fact that those acts were by nature very varied, so much so that several Governments had expressed doubts as to whether rules could be enacted that would be generally applicable to them. That view must be qualified, however, because it should be possible to pinpoint features common to all such acts and thus elaborate rules valid for all.

513. As to the possibility of using the 1969 Vienna Convention on the Law of Treaties as a basis, he noted that the members of the Commission had expressed very differing and even contradictory views on that question at preceding sessions. To avoid reopening an endless discussion, he favoured an intermediate approach: although simply transposing the articles of the Vienna Convention to unilateral acts was obviously not conceivable, it was not possible to ignore that instrument and its *travaux préparatoires* either. The parts of the Vienna Convention which had to do, for example, with the preparation, implementation, legal effects, interpretation and duration of the act clearly provided a very useful model, although unilateral acts did, of course, have their own features.

514. The link between unilateral acts and estoppel was perfectly clear. However, as he pointed out in paragraph 27 of his report, "It should be borne in mind [...] that the precise objective of acts and conduct relating to estoppel is not to create a legal obligation on the State using it; moreover, the characteristic element of estoppel is not the State's conduct but the reliance of another State on that conduct".

515. In view of the comments made by the members of the Commission at the last session and by the Sixth Committee, the Special Rapporteur said that he had taken special care in reformulating article 1 (former art. 2) on the definition of unilateral acts, which was very important because it was the basis of all the draft articles. The issue was not so much to give the meaning of a term as to define a category of acts in order to be able to delimit the topic. A number of elements were decisive: the intention of the author State, the use of the term "act", the legal effects and the question of autonomy or, more exactly, the "non-dependence" of the acts. All unilateral acts, whether protests, waivers, recognitions, promises, declarations of war, etc., had in common that they were unilateral manifestations of will and had been formulated by a State for an addressee (whether a State, several States, the international community as a whole or one or more international organizations) with a view to producing certain legal effects. In practice, however, the fact that unilateral acts could take various forms did not simplify matters: for example, a protest could, like a promise, be formulated by means of a written or oral declaration, but also by means of what might be called "conclusive" conduct, such as breaking off or suspending diplomatic relations or recalling an ambassador. The question was whether such acts were really unilateral acts within the meaning of the draft articles.

516. The Special Rapporteur stressed that all unilateral acts nevertheless contained a fundamental element, the intention of the author State. It was on that basis that it could be

determined whether a State intended to commit itself legally or politically at the international level. If the State did not enter into such a commitment, then, strictly speaking, there was no unilateral act.

517. It was worth noting that, in the new draft article 1,[117] he had replaced the word "declaration" used in the earlier version by the word "act". It was usually by means of a written or oral declaration that States expressed waiver, protest, recognition, promise, etc., and, at first glance, it had appeared that that term could serve as a common denominator, but he had ultimately joined those who had considered that that approach was too restrictive and that the word "declaration" could not apply to certain unilateral acts. He therefore decided to use the word "act", which was more general and had the advantage of not excluding, a priori, any material act, although doubts remained as to whether certain acts or conclusive conduct, such as those envisaged in the context of a promise, could be considered unilateral acts.

518. Another question, which had already been raised, was that of legal effects. In the earlier version, legal effects had been confined to obligations which the State could enter into through a unilateral act, but, after the discussion in the Commission, it had appeared that the words "produce legal effects" had a much broader meaning and that the State could not only enter into obligations, but also reaffirm rights. According to the doctrine, although a State could not impose obligations on other States through a unilateral act, it could reaffirm that certain obligations were incumbent on those States under general international law or treaty law. That was the case, for example, with a unilateral act by which a State defined its exclusive economic zone. In so doing, the State reaffirmed the rights which general international law or treaty law conferred on it and rendered certain obligations operative which were incumbent on

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[117] Draft article 9 reads:

Article 1

Definition of unilateral acts

> For the purposes of the present articles, unilateral acts of a State means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.

A/CN.4/505, p. 13.

other States. Needless to say, that position was not contrary to the well-established principles of international law which were expressed in the sayings *pacta tertiis nec nocent nec prosunt* and *res inter alios acta* because it was clear that a State could not impose obligations on other States in any form without the consent of the latter.

519. The term "autonomous" used in the previous draft article 2[118] to characterize unilateral acts no longer appeared in the draft article proposed in paragraph 80 of his report owing to the unfavourable reactions of several members of the Commission, which were summarized in paragraph 63 of his report. The Special Rapporteur nevertheless believed that a number of points would need to be added to the commentary to distinguish unilateral acts which depended on a treaty from unilateral acts in the strict sense. He had always considered that a dual independence could be established: independence vis-à-vis another act and independence vis-à-vis the acceptance of the unilateral act by its addressee. That was what had prompted him to put forward the idea of dual autonomy in his first report, but he had not included it in the new draft, since the comments of the members of the Commission had been far from favourable. Although the word "autonomy" was not used, however, it must be understood that the unilateral acts in question did not depend on other pre-existing legal acts or on other legal norms. The question remained open and he looked forward with interest to learning the Commission's majority opinion on the issue.

520. Another question considered in the report was that of the unequivocal character of unilateral acts. As already pointed out, the State's manifestation of will must be unequivocal and that question was more closely linked to the intention of the State than to the actual content of the act. The manifestation of will must be clear, even if the content of the act was not necessarily so. "Unequivocal" meant "clear" because, as noted by the representative of one State in the Sixth Committee, it was obvious that there was no unilateral legal act if the author State did not clearly intend to produce a normative effect.

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[118] Draft article 2 reads:

Article 2

Capacity of States to formulate unilateral acts

Every State possesses capacity to formulate unilateral acts.

Ibid., p. 14.

521. In a final point on draft article 1, the Special Rapporteur said that the term "publicity", which had to be understood in connection with the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects, had been replaced by the words "and which is known to that State or international organization". What was important was for the text to indicate that the act must be known to the addressee because the unilateral acts of the State bound it to the extent that it intended to commit itself legally and the other States concerned were aware of that commitment.

522. The Special Rapporteur also suggested in his report that the draft should not include an article based on article 3 of the 1969 Vienna Convention because, unlike that instrument, the draft articles covered unilateral acts in the generic sense, which included all categories of unilateral acts. The Vienna Convention had to do with a type of conventional act, the treaty, which it defined but without excluding other types of conventional acts distinct from the treaty as defined in paragraph 1 (a) of article 2 of the Convention, to which the rules of the Convention could be applied irrespective of the Convention itself. Account had also been taken of the opinion of the members of the Sixth Committee who did not want an article on that question to be included in the draft.

523. The new draft article 2 on the capacity of States to formulate unilateral acts was by and large a repetition of the earlier text based on the drafting changes suggested by the members of the Commission at the preceding session.

524. The report also contained a draft article 3[119] on persons authorized to formulate unilateral acts on behalf of a State, which had been modelled on article 7 of the 1969 Vienna Convention

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[119] Draft article 3 reads:

Article 3

Persons authorized to formulate unilateral acts on behalf of the State

> 1. Heads of State, heads of Government and Ministers for Foreign Affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.
>
> 2. A person is also considered to be authorized to formulate unilateral acts on behalf of the State if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as authorized to act on behalf of the State for such purposes.

Ibid., p. 17.

and followed the 1999 text with a few changes. Some States had indicated that the 1969 Vienna Convention might be closely followed in the case of the capacity of representatives or other persons to engage the State. The Special Rapporteur said that paragraph 1 of the draft article should remain unchanged, since, during the consideration of his second report in 1999, the comments had been very similar to those made when the Commission had adopted its draft articles on the law of treaties and to those made at the Vienna Conference. Paragraph 2 had been amended, however, and its scope expanded so as to permit persons other than those referred to in paragraph 1 to act on behalf of the State and to engage it at the international level. That text was in keeping with the specificity of unilateral acts and departed from the corresponding provision of the 1969 Vienna Convention. The point was to take account of the need to build confidence and security in international relations, although it might be thought that, on the contrary, such a provision might have the opposite effect. In his view, extending authorization to other persons who could be regarded as acting on behalf of the State might very well build confidence, and that was precisely the aim of the Commission's work on the topic. The paragraph used the word "person" instead of the word "representative" and, in the Spanish version, the word "habilitación" instead of the word "autorización", which had not been accepted in 1999 for the reasons given in paragraphs 106 and 107 of his report.

525. Draft article 4[120] on subsequent confirmation of an act formulated by a person not authorized for that purpose, which had been based on the 1969 Vienna Convention, adopted the

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[120] Draft article 4 reads:

Article 4

Subsequent confirmation of an act formulated by a person not authorized for that purpose

A unilateral act formulated by a person who is not authorized under article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State.

Ibid., p. 18.

wording of draft article 5[121] as submitted at the preceding session. That provision covered two different situations: either a person might act on behalf of the State without being authorized to do so or he could act on behalf of the State because he was authorized to do so, but either the action in question was not within the competencies accorded to that person or he acted outside the scope of such competencies. In such cases, the State could confirm the act in question. In the 1969 Vienna Convention, that confirmation by the State could be explicit or implicit, but it had been considered that, in that particular case, in view of the specificity of unilateral acts and the fact that, in certain instances, clarification must be restrictive, such confirmation should be explicit so as to give greater guarantees to the State formulating the unilateral act.

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[121] Draft article 5 reads:

Article 5

Invalidity of unilateral acts

A State may invoke the invalidity of a unilateral act:

1. If the act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

2. If a State has been induced to formulate an act by the fraudulent conduct of another State;

3. If the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State;

4. If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him;

5. If the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

6. If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;

7. If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;

8. If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it.

Ibid., p. 22.

526. The Special Rapporteur's second report had contained a specific provision, draft article 6, on expression of consent that had been considered unduly reminiscent of treaty law, i.e. too close to the corresponding provision of the 1969 Vienna Convention and hence neither applicable nor justifiable in the context of unilateral acts. As indicated in paragraph 125 of his report, "If it is considered that articles 3 and 4 can, in fact, cover the expression of consent, then a specific provision on the manifestation of will or expression of consent would not be necessary." The question of manifestation of will was closely connected with the coming into being of the act, i.e. the time at which the act produced its legal effect or, in the case of unilateral acts, the time of their formulation. Under treaty law, by contrast, the coming into being of a treaty, or the time at which it produced its legal effect, was connected with its entry into force.

527. The Special Rapporteur went on to say that silence, which was linked to expression of consent, was being omitted from the study because, as recognized by the majority of the members of the Commission, it did not constitute a legal act, even if it could not be said to produce no legal effect. On the other hand, the importance attached to silence in the shaping of wills and the forging of agreements and in relation to unilateral acts themselves was well known. Nevertheless, whether or not silence was a legal act and regardless of the fact that the current study dealt with acts formulated with the intention to produce legal effects, silence could not, in his view, be considered to be independent of another act. In remaining silent, a State could accept a situation, even waive a right, but it could hardly make a promise. At all events, silence was basically reactive conduct that must perforce be linked to other conduct, an attitude or a previous legal act.

528. Lastly, the report examined the question of the invalidity of a unilateral act, an issue that had to be addressed in the light of the 1969 Vienna Convention and international law in general. The draft article submitted by the Special Rapporteur was broadly based on the provisions of the Vienna Convention on the Law of Treaties and was similar to that proposed in the second report. In the new version, he had inserted an important cause of invalidity based on a comment that a member of the Commission had made the previous year on the invalidity of an act that conflicted with a decision adopted by the Security Council under Chapter VII of the

Charter on the maintenance of international peace and security. Although the Council could also adopt decisions under Chapter VI on the establishment of commissions of enquiry, the cause of invalidity related solely to Security Council decisions adopted under Chapter VII.

3. Summary of the debate

529. Members generally welcomed the third report of the Special Rapporteur which made an attempt to bring order into a topic which presented many difficulties owing to its complexity and diversity and endeavoured to reconcile the many divergent views expressed both in the Commission and in the Sixth Committee.

530. As regards the *relevance* of the topic of unilateral acts of States, many members stressed the importance of unilateral acts in day-to-day diplomatic practice and the usefulness of the codification of the rules applying to them. In view of the frequency and importance of such practice, it was said, an attempt must be made to clarify and organize the general legal principles and customary rules governing such acts in order to promote stability in international relations. Although the subject was a complex one, that did not mean that it could not be codified. At issue was a category of acts which were very important in international relations, at least as old as treaties and, like the latter, a source of contemporary international law. A view was also expressed in this connection that a unilateral act could even be considered a substitute for a treaty when the prevailing political environment prevented two States from concluding a treaty.

531. The view was also expressed that the relevance of the topic did not have to be raised any longer since the matter had been settled when the Commission and the General Assembly had decided to inscribe the topic on the Commission's agenda. Unilateral acts of States, as they were understood in the draft, existed in international practice and were even a source of international law, even though article 38 of the Statute of the International Court of Justice did not refer to them. In certain circumstances, that source could, of course, create rights and obligations of a subjective nature for States, but it could not, in principle, create law or, in other words, generally applicable international rules. States could not legislate in a unilateral way. It was undeniably a difficult subject to deal with, in the first place because national constitutions and domestic laws generally had nothing, or very little, to say about the unilateral acts of States that might bind the latter at the international level, unlike, for example, the conventions and customary rules that were generally dealt with in the framework of the domestic legislation of States. Moreover, there was far from an abundance of international practice concerning those acts. Indeed, there

were few acts by which States granted rights to other States while themselves assuming the obligations corresponding to those rights. It therefore fell to the Commission, with few tools or guidelines, to codify the rules of a little-known area with a double aim in mind: to protect States themselves from their own actions by offering them a coherent set of clear rules on the unilateral acts that could be binding on them at the international level and to serve the interests of the international community, by deriving the core rules from that new source of law.

532. On the other hand, some members expressed misgivings about the fitness of the topic for codification. Thus, in one view, unilateral acts were attractive to States precisely because of the greater freedom States enjoyed in applying them, as compared with treaties. In deciding how to "codify" such relative freedom of action, the Commission was faced with a dilemma: either it applied a straightjacket *à la* Vienna Convention to a wide range of unilateral acts and the product would then be totally unacceptable to States, or it confined its work to unilateral acts for which there was at least some trace of an accepted legal regime. The outcome would then be of limited value, because it would mean prescribing them something that States did anyway. It was also pointed out in this connection that, if the attraction for States lay precisely in their relative flexibility and informality, then the question as to whether there was a need and a legal background for the codification of rules governing unilateral acts called for reconsideration.

533. Some members also pointed to the great diversity of unilateral acts present in the practice of States as a factor which rendered difficult a general exercise of codification in their regard and suggested that a step by step approach to the topic dealing separately with each category of act might be more appropriate.

534. In the view of other members the appropriate course of action would be to divide the draft articles into two parts: the first would establish general provisions applicable to all unilateral acts and, the second, provisions applicable to specific categories of unilateral acts which, owing to their distinctive character, could not be regulated in a uniform way.

535. Many members stressed the importance of a good survey of State practice in any attempt to codify the topic and encouraged the Special Rapporteur to reflect extensively such practice in his reports and to anchor his proposed draft articles on it. In this connection, the hope was expressed that governments in their replies to the questionnaire would not only express their views but also send materials of their State practice.

536. Many members referred to the relationship between the draft articles on unilateral acts and the 1969 Vienna Convention on the Law of Treaties and supported the concept of "flexible

parallelism" developed by the Special Rapporteur in paragraphs 15 to 22 of his report. It was pointed out in this connection that the treaty law norms codified in the 1969 Vienna Convention served as a useful frame of reference for an analysis of the rules governing unilateral acts of States. Treaties and unilateral acts were two species of the same genus, that of legal acts. It followed that the rules reflecting the parameters and characteristics shared by all categories of legal acts should be applicable both to bilateral legal acts - treaties - and to unilateral legal acts. But the existence of parallel features did not warrant the automatic transplantation of the norms of the Vienna Convention on the Law of Treaties for the purpose of codifying the rules governing unilateral acts of States. There were important differences and that was why the Special Rapporteur had wisely recommended "a flexible parallel approach". It was also said that if there was no Vienna Convention, it would be simply impossible to codify the unilateral acts of States that were binding on them under international law. The Vienna Convention had truly paved the way for the codification of the unilateral acts of States. However, the solutions in the Convention should not be reproduced word for word. It should be used sensibly and very carefully as a source of inspiration when the characteristics of a binding unilateral act coincided exactly with those of a treaty act. In other words, it was necessary to take the study of unilateral acts of the State as the starting point and turn to the Vienna Convention on the Law of Treaties for solutions, if necessary, and not the other way around.

537. Some members advocated caution on this matter. Thus, in one view, it was essential to avoid taking analogy with treaty law too far because it might lead to confusion. According to another view it would be inadvisable to follow closely the 1969 Vienna Convention since there were essential differences between treaty law and the law on unilateral acts.

538. With specific reference to the 1986 Vienna Convention on the Law of Treaties between States and international organizations or between international organizations, and its possible relevance for unilateral acts the view was expressed that it was still unclear whether the draft covered the effects of unilateral acts by States vis-à-vis international organizations and of acts by international organizations when their conduct was comparable to that of States. International organizations were mentioned only in draft article 1 and then only as the addressees, not the authors, of international acts. Although the Commission had wisely decided to exclude resolutions adopted by international organizations from the draft, the word "resolution" did not cover the whole range of acts undertaken by such organizations. International organizations, above all regional integration organizations, could also enter into unilateral commitments,

vis-à-vis States and other international organizations. The issues raised by such acts must therefore be addressed *mutatis mutandis* in the light of the 1986 Vienna Convention.

539. Several members referred to paragraphs 23 to 27 of the report in which the Special Rapporteur deals with the issue of *estoppel* and its relationship to unilateral acts.

540. In one view, the fundamental factors in the case of estoppel was the conduct of the addressee whereas, conversely in the case of a unilateral act the addressee's conduct added nothing, save in exceptions, to the binding force of the act. It was also noted in this connection that estoppel was not, as such, either a unilateral or bilateral legal act, but a situation or an effect which was produced in certain circumstances in the context of both legal and ordinary acts and which had a specific impact on a legal relationship between two or more subjects of international law. It could therefore be omitted for the time being from the general study of unilateral acts and taken up later to determine its possible impact in particular contexts.

541. Some other members adopted a somewhat more active approach towards the possibility that the Commission take up the question of estoppel within the context of unilateral acts of States. Thus in one view, the basic idea concerning estoppel in international law seemed to be that a State or international organization must not vacillate in its conduct vis-à-vis its partners and thereby mislead them. Any unilateral act could probably give rise to estoppel. Estoppel could result from a unilateral act when that act had prompted the addressee to base itself on the position expressed by the State that was the author of the act. Estoppel formed part of the topic in that it constituted one of the possible consequences of a unilateral act. It should therefore be addressed when the Special Rapporteur dealt with the effects of unilateral acts. Along the same lines, the view was also expressed that estoppel was not in itself a legal act, but, rather, a fact that produced legal effects and consequently it should be considered within the framework of the effects of unilateral acts.

542. Also addressing general issues relating to the topic one view pointed out that the major problem with the methodology adopted thus far arose from the fact that non-dependent or autonomous acts could not be legally effective in the absence of a reaction on the part of other States, even if that reaction was only silence. The reaction could take the form of acceptance - either express or by implication - or rejection. Another problem was the possibility of an overlap with the case where the conduct of States constituted an informal agreement. For example,

the *Eastern Greenland*[122] case, which some authors saw as a classic example of a unilateral act, could also be described as a case of an informal agreement between Norway and Denmark. Such problems of classification could generally be solved by a savings clause. According to this view, the subject of estoppel also involved the reaction of other States to the original unilateral act. In the *Temple of Preah Vihear*[123] case, for example, Thailand had been held by her conduct to have adopted the line on the Annex I map. Whilst the episode undoubtedly involved a unilateral act or conduct on the part of Thailand, that country's conduct had been considered opposable to Cambodia. In other words, there had been a framework of relations between the two States. In this view, it was important to make a general point concerning the definition of the topic and, in particular, the nature of the precipitating conduct or connecting factor. The concept of declarations had now been discarded, but the very expression "unilateral acts" was also probably too narrow. Everything depended on the conduct of both the precipitating State and other States - in other words, on the relationship between one State and others. The related general issue of the evidence of intention was a further reason for defining the connecting factor or precipitating conduct in fairly broad terms. The concept of "act" was too restrictive. The legal situation could not be seen simply in terms of a single "act". The context and the antecedents of the so-called "unilateral act" would often be legally significant. In that context, the references made to the effect of silence might also involve a failure to classify the problem efficiently. What had to be evaluated was silence in a particular context and in relation to a certain precipitating act, not silence per se or in isolation. According to this view, a general difference between the topic under consideration and the law of treaties was that, in the case of treaties, there was a reasonably clear distinction between the precipitating conduct - the treaty - and the legal analysis of the consequences. In the case of unilateral acts or conduct, it was often very difficult to separate the precipitating act or conduct and the process of constructing the legal results. That observation, too, could be illustrated by the *Temple of Preah Vihear*[124] case.

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[122] P.C.I.J., Series A/B, No. 53.

[123] *I.C.J. Reports*, 1962.

[124] Ibid.

543. Speaking generally on article 1 on the definition of the unilateral act of the State, several members welcomed the new wording proposed by the Special Rapporteur which was a simplified version of his previous proposals. They noted with satisfaction that it incorporated many of the suggestions made in the Commission and in the Sixth Committee and considered it as an improvement over previous sessions, even if it could still perhaps be further refined.

544. Several members welcomed in particular the deletion of the word "declaration" from the definition and its replacement by the word "act", since in their view, the word "declaration" was both ambiguous and restrictive.

545. It was observed that the main differences between the previous and the new definition of unilateral acts consisted of the deletion of the requirement that such acts should be "autonomous", the replacement of the expression "the intention of acquiring international legal obligations" by the expression "the intention of producing legal effects" and the replacement of the requirement of "public formulation" by the condition that the act had to be known to the State or international organization concerned.

546. Some members expressed some reservations on the definition. In one view, the definition did not take into account the formal aspects of unilateral acts. In another view, a general and unified definition on all unilateral acts was not appropriate given the variety of unilateral acts to be found in State practice.

547. Some other members preferred to abstain from expressing a view on the definition until the Commission made a final decision on the kind of acts to be included under its study. This was particularly the case of some members who opposed the deletion of previous article 1 of the draft articles dealing with their scope (see para. 69 below).

548. Several members addressed more specifically the element of the proposed definition consisting in the expression of will with the intention to produce legal effects. The fundamental importance of the intention of the author State in the formulation of the act was underscored by those members who recalled in this connection the judgement of the International Court of Justice in the *Nuclear Tests* cases.[125] The author of a unilateral act, it was said, had to have the intention to make a commitment and impose upon itself a certain line of obligatory conduct.

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[125] Nuclear Tests (Australia v. France; New Zealand v. France), judgments, 20 December 1974, *I.C.J. Reports*, 1974.

549. While some members felt that there might be an overlap or tautology between the words "expression of will" and "intention", other members did not think that this was the case.

550. Several members supported the reformulation of the article which now made it clear that the object of the intention was the production of legal effects. This distinguished the unilateral acts under the Commission's study from merely political acts. Some members however felt that the definition did not go far enough in determining the kind of legal effects produced by the act. Thus, in one view, a distinction should be drawn between unilateral acts that had legal effects immediately upon their formulation and irrespective of the action taken by other States, and unilateral acts that had legal effects only upon their acceptance by other States. Not all acts that put into effect the rules of law required the acceptance of other States - within the limits of the law, States could unilaterally realize their own rights. According to this view, the Special Rapporteur had been able to pinpoint the main issues that needed to be resolved at the initial stage of work, but the whole spectrum of unilateral acts could not be covered in general rules. He should identify those unilateral acts that deserved study and then determine the legal characteristics of each. An analysis of doctrine and State practice revealed that in most cases, promises, protests, recognition and renunciation were considered to be unilateral acts. According to this view, unilateral acts could be divided into a number of categories. First there were "pure" unilateral acts, those that truly implemented international law and required no reaction from other States. Then there were acts whereby States took on obligations. They were often called promises, although the term was a misnomer as it referred to moral, not legal, imperatives. When recognized by other States, such acts created a form of agreement and, as such, could give rise for other States not only to rights, but also obligations. Finally, there were acts corresponding to a State's position on a specific situation or fact - recognition, renunciation, protest - which were also purely unilateral in that they required no recognition by other States. In another view, the very broad character of the expression "producing legal effects" made in practice impossible to formulate common rules for acts as disparate as promise, recognition, protest or waiver. A step-by-step approach seemed preferable.

551. Some members pointing to the vagueness of the distinction between political and legal acts stressed the difficulties often associated with determining the true intention of a State when formulating an act. It was said in this connection that often the intention needed the ruling

of an international tribunal for it to become clear. It was also said in this connection that a State was a political entity whose intentions could be equivocal or unequivocal depending on the context. The criterion of the effect actually produced had always to be assessed in order to determine the nature of the intention. A contextual examination of policy considerations played a very important role in assessing the intention underlying the act. For these members it was unfortunate that the Special Rapporteur had not sufficiently stressed in the definition the idea of context on which, for example, the International Court of Justice had relied in the *Maritime Delimitation and Territorial Questions between the Qatar and Bahrain (Jurisdiction)*[126] case. In another view, the fact that a State decided to perform an act invariably meant that it found some interest in doing so. The idea of interest should therefore be incorporated in an objective definition of a unilateral act, not to replace the idea of intention, but as a way of giving meaning and context to that idea which was more difficult to define.

552. As regards the phrase "*in relation to one or more other States or international organizations*" which in the proposed definition qualified the words "legal effects", it was queried why the Special Rapporteur wished to limit the effects of unilateral acts to relations with the other States and international organizations since peoples, national liberation movements or individuals could also be beneficiaries of legal commitments. It was suggested that the definition of treaties in article 1 (a) of the 1969 Vienna Convention should serve as a guide in that regard. According to the Convention a treaty was an international agreement governed by international law. For those members it was essential to apply the same terms to unilateral acts stating that a unilateral act was first and foremost an act governed by international law and then placing the author of the act squarely within the ambit of international law rather than domestic law. These members suggested to replace the words "in relation to one or more other States or international organizations" by the phrase "and governed by international law".

553. As regards the word "*unequivocal*" which in the proposed definition qualified the words "expression of will" some members found it acceptable since in their view it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions or how it could be easily and quickly revoked.

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[126] *I.C.J. Reports*, 1994 and 1995.

554. Other members, however, were strongly opposed to the inclusion of the word "unequivocal" and recalled that in the definition elaborated by the Working Group at the previous session of the Commission the word "unequivocal" had not been included. It was said in this connection that it should be understood that the expression of will must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act. It was also pointed out that the ideas of clarity and certainty that the Special Rapporteur was trying to convey by means of the word "unequivocal" was a question of judgement which was traditionally for the judge to decide and did not belong in the definition of unilateral acts. It was also said against the inclusion of the word "unequivocal" that the nuclear test case showed that "lack of ambiguity" could result not from a formally identifiable act but from a combination of oral declarations that dispensed with the need for formal written confirmation.

555. Some members supported the decision of the Special Rapporteur not to include the notion of "autonomy" in the proposed definition of unilateral act. It was noted in this connection that a unilateral act could not produce effects unless some form of authorization to do so existed under general international law. The authorization could be specific, for example where States were authorized to fix unilaterally the extent of their territorial waters within a limit of 12 nautical miles from the baseline. Or it could be more general, for example, where States were authorized unilaterally to enter into commitments limiting their sovereign authority. But unilateral acts were never autonomous. Acts that had no basis in international law were invalid. It was a matter not of definition but of validity or lawfulness.

556. Other members had mixed reactions to the deletion of the notion of autonomy from the definition. Thus, in one view the need to exclude from the definition acts linked to certain legal regimes such as acts linked to treaty law made it necessary to include the notion of autonomy in the definition. In another view, while the term "autonomy" might not be entirely satisfactory, the idea of non-dependence as a characteristic of unilateral acts did not deserve to be discussed altogether.

557. In yet another view, the deletion of the word "autonomous", included in previous definitions of unilateral acts, created certain difficulties. It would mean that unilateral acts included acts performed in connection with treaties. In view of the insistence of some members

of the Commission on deleting the word, however, a compromise might be found by inserting the word "unilaterally" after "intention of". It would be construed in that context to refer to the autonomous nature of the act.

558. Several members referred to the words "*and which is known to that State or international organization*". These words were the object of criticism on various accounts.

559. Some members expressed concern that the Special Rapporteur, in his proposed definition, had departed, without justification, from the definition agreed upon in the Working Group at the preceding session of the Commission. Whereas in the definition adopted by the Working Group the act was to be notified or otherwise made known to the State or international organization concerned, the only requirement now was that it should be known to the State or international organization. That wording was misleading because it could give the impression that the knowledge might have been acquired, for example, through espionage or the activities of intelligence services. But the State that was the author of the act must take some step to make it known to its addressee(s) or to the international community. Given the fact that paragraph 131 of the topical summary of the discussion in the Sixth Committee (A/CN.4/504) stated that the expression adopted in the Working Group had gained the support of delegations these members wondered why the Special Rapporteur had proceeded to change it. It was also noted that the reference to "State or international organization" failed to correspond to the words "one or more States or international organizations" used in the preceding clause, and it created confusion.

560. In another view, the addressee of a unilateral act must obviously know about it if the act was to produce legal effects. Yet the idea of knowledge raised questions regarding the point at which knowledge existed and how to determine whether the addressee possessed such knowledge. A State might obtain knowledge of the act only after a certain period of time. In that case, the question arose whether the unilateral act came into being only from the time of acquisition of the knowledge or from the time when the addressee State indicated that it had obtained knowledge of the act. Knowledge was, in this view, a concept that raised many more problems than it solved. There was no justification for eliminating the idea of the "public formulation" of the act. What counted, for both practical and theoretical reasons, was publicity of the formulation of the act rather than its reception.

561. Some other members felt that the clause under consideration did not belong in the definition since knowledge of the act was a condition of its validity.

562. Some members expressed support for the *deletion of previous draft article 1 on the scope of the draft articles*. It was agreed, in this connection, that new article 1 on definition of unilateral acts contained the elements relating to the scope of application of the draft and, consequently, a specific article on the scope was unnecessary. It was also said, in connection with the scope of the draft, that there was no need for a provision along the lines of article 3 of the 1969 Vienna Convention on the Law of Treaties concerning the legal force of international agreements not within the scope of the Convention and the provisions of international law which apply to them. The draft under consideration referred to unilateral acts and this term was broad enough to cover all unilateral expressions of will formulated by a State.

563. On the other hand, some members were of the view that a set of general provisions of the draft should also include a provision on scope. A typology of various categories of unilateral acts, not merely designated but accompanied by their respective definitions could be introduced at that point. It was added in this connection that some categories of unilateral acts should be excluded from the draft, for example those pertaining to the conclusion and application of treaties (ratification, reservations, etc.). A detailed list of acts to be excluded would have to be compiled and that called for the reintroduction of a draft article concerning scope comparable to articles 1 and 3 of the 1969 Vienna Convention. It should be specified that the draft articles were applicable only to unilateral acts of States, and not to acts of international organizations.

564. It was also suggested by some members that new article 1 could somehow be supplemented by a reference to the form in which a unilateral act could be expressed, along the lines of article 2, paragraph 1 (a) of the two Vienna Conventions on the Law of Treaties. The article should make it clear that a unilateral act of a State may take the form of a declaration or otherwise any other acceptable form, orally or in written form. In such a manner, the diversity of unilateral acts of States revealed by State practice would be fully covered.

565. New draft article 2 on capacity of States to formulate unilateral acts was generally supported. It was said in this connection that the provision undoubtedly formed part of the general provisions of the draft. It recalled the inherent link between the State and the unilateral act. The expression of will reflected the legal personality of the State; it meant that, whatever its size or political importance, a State remained a State and that all States were each others' equals. The concept of legal personality was akin to the concept of equality of States. The capacity of the State to formulate unilateral acts was therefore inherent in the nature of the State.

566. Some drafting suggestions were made. One of them consisted in adding the words "in accordance with international law" at the end of the provision. Another suggestion was to add the words "liable to create rights and obligations at the international level". Still another suggestion was to replace the verb "to formulate" by the verb "to issue".

567. Speaking generally on article 3 dealing with persons authorized to formulate unilateral acts on behalf of the State, support was expressed for the article as a whole and for the fact that the Special Rapporteur had deleted paragraph 3 of former article 4 which dealt with the same subject matter and had now become article 3. It was said in this connection that the inclusion of a formula taken from article 7 of the 1969 Vienna Convention on the Law of Treaties did not seem appropriate in the context of the present draft.

568. According to one view, one issue which had been omitted but needed to be added was analogous to that dealt with in article 46 of the Vienna Convention on the Law of Treaties, namely competence under internal law to conclude treaties. Article 3 specified the persons who were authorized to formulate unilateral acts on behalf of the State, but said nothing about whether, under constitutional or statutory provisions, some other organs of State had to be involved for the act to be validly formulated. The fact that a head of State could ratify a treaty did not mean that there were no constitutional rules requiring prior authorization by parliament. In this view, it should first be established whether there were constitutional rules applicable to unilateral acts and, if not, to what extent the constitutional rules applicable to treaties could be applied by analogy, under constitutional law, to some of the unilateral acts being dealt with by the Commission. It should then be established whether infringement of the constitutional rules had implications for the validity of unilateral acts.

569. In another view, it would be more appropriate to defer a final judgement on article 3 until it had been definitely determined, in article 1, which acts fell within the scope of the draft articles.

570. Support was expressed, in general, for paragraph 1 of article 3. In one view the words "are considered as representatives" should be replaced by the words "are representatives". In another view, however, the presence of the words "are considered" created a rebuttable formulation which was necessary in the paragraph. Furthermore, the proposed change might create problems of incompatibility with the constitutions of some countries.

571. While in one view "technical ministers" should perhaps be included in the paragraph as representatives capable of formulating unilateral acts, in another view the very notion of "technical ministers" was not an appropriate one.

572. In one view, governmental institutions, especially plenary bodies and legislative organs should also be entitled to formulate unilateral acts. This view referred specifically to parliaments and bodies and councils that sprang up spontaneously following periods of domestic instability, which consolidated power in their own hands and were capable of exercising sovereignty pending the establishment of permanent institutions.

573. In this connection, the observation was made that if parliament were to be considered among the persons authorized to formulate unilateral acts on behalf of the State, it was doubtful whether it was covered by the present formulation of paragraph 2 and perhaps an express mention in paragraph 1 was necessary.

574. Referring to the written comment by one Government to include in paragraph 1 also heads of diplomatic missions, doubts were expressed as to whether they could perform unilateral acts without specific authorization.

575. Paragraph 2 was supported in general but a number of drafting observations were made in its regard. It was suggested to replace the words "a person" by the words "another person". It was also suggested that the words "practice of the States concerned" should be amended to reflect the fact that the practice referred to was that of the State author of the unilateral act in question. In one view, the words "other circumstances" might require further clarification, since that concept was relative in time and space. The formulation "circumstances in which the act was carried out" was suggested. In another view, the reference to "other circumstances" was very useful. In this view, assurances given by a State's agent or other authorized representative in the course of international court proceedings might perhaps be given specific mention in that regard in the commentary to article 3. The example of the 1995 *East Timor*[127] case was recalled in this connection.

576. According to one view, paragraph 2, in its present form, was too broad. Nobody could investigate the practice and circumstances of each State to decide whether a person who had formulated a unilateral act was authorized to act on behalf of his State. That would leave the door open for any junior official to formulate a unilateral act that would more than likely be

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[127] *I.C.J. Reports*, 1995.

invalidated subsequently. According to this view, the Commission should restrict the category of persons who could formulate unilateral acts under paragraph 2 to heads of diplomatic missions and other State ministers who had full authorization to do so for specific purposes only. In that way, it could draw the line between the general authority attributed to the three categories of persons in paragraph 1 and more limited authority attributed to the category of persons in paragraph 2.

577. In one view, article 3 should be supplemented by a third paragraph consisting in the present article 4 on subsequent confirmation of an act formulated by a person not authorized for that purpose. According to this view, article 3, further to this addition, could also be reformulated in the light of the following three principles. First, the transposition of the categories of authority identified by the Law of Treaties (Head of State, Prime Minister, Minister for Foreign Affairs) to the law of unilateral acts was acceptable. Secondly, if the set of authorities qualified to engage the State unilaterally was to be extended, that should not bring in to play certain techniques specific to the law of treaties, such as full powers, but should be based on the position of the author of the unilateral act within the State apparatus or, in other words, on the way political power was exercised within the State and on the specific technical field in which the author of the unilateral act operated, subject to confirmation in both cases. Thirdly, the extension of the set of authorities to heads of diplomatic missions or permanent representatives of States to international organizations would be acceptable under the same conditions. As a result, in paragraph 1, the phrase "are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf" should be replaced by "are competent for the purpose of formulating unilateral acts on behalf of the State". In the French text of paragraph 2, the phrase "Une personne est considérée comme habilitée par l'État pour accomplir en son nom un acte unilatéral" was unwieldy and should be replaced by "Une personne est présumée compétente pour accomplir au nom de l'État un acte unilatéral".

578. Article 4 on subsequent confirmation of an act formulated by a person not authorized for that purpose was generally supported. Reservations were expressed however by some members on the word "expressly" relating to the confirmation. These members wondered why a unilateral act might not be confirmed tacitly since the confirmation of an unilateral act should be governed by the same rules as its formulation. The view was expressed in this connection that a unilateral act could be confirmed "*per concludentiam*" when the State did not invoke the lack of authorization as grounds for invalidity of the act but fulfilled the obligation it had assumed.

579. In the view of some members the contents of paragraph 4 could be incorporated as a third paragraph of article 3.

580. The observation was made that in the French version the words "effets juridiques" should be placed in the singular.

581. On the other hand, there was one view which did not support the article because it was not sufficiently restrictive. In this view, if a person formulated a unilateral act without authority to do so, his State subsequently could not approve his unlawful action. Under the law of obligations, such a person acted illegally, and his action was therefore void *ab initio*. Accordingly, a State could not give subsequent validity to conduct that was originally unauthorized.

582. Support was expressed in the Commission for the *deletion of former article 6 on the expression of consent*.

583. On the question of *silence* and unilateral acts, which in his third report the Special Rapporteur dealt with in connection with the deletion of previous article 6, differing views were expressed.

584. In the view of some members, silence could not be regarded as a unilateral act in the strict sense since it lacked intention which was one of the important elements of the definition of a unilateral act. Consequently, the question of silence and unilateral acts did not belong in the draft articles.

585. Other members were of a different view. They stressed that while some kinds of silence definitely did not and could not constitute a unilateral act, others might be described as an intentional "eloquent silence" expressive of acquiescence and therefore did constitute such an act. The *Temple of Preah Vihear* case was recalled in this connection. It was further noted in this connection that silence could indeed constitute a real legal act, as accepted by the doctrine. Silence indicating acquiescence could in some situations allow the initial unilateral act to produce all its legal effects, particularly when that act was intended to create obligations on the part of one or more other States. In some cases, a State could express its consent through silence, even though consent must be explicit in treaty law. In modern times, it was also said, silent agreement played a major role in the development of general international law, including *jus cogens*. In numerous instances the Security Council had adopted resolutions, including those establishing military tribunals, in an exercise of powers that were not accorded to it under the Charter - and the States Members of the United Nations had given tacit recognition to those

decisions, which had consequently acquired force. Furthermore, silence could be tantamount to an admission in the area of the law of evidence. In a conflict situation, if a State challenged another State to prove that it was making a false claim about an act of the other State and if the latter State remained silent, its silence could be taken as acquiescence.

586. Speaking generally on article 5 some members stressed its relationship with a necessary provision on the conditions of validity of the unilateral act, which had not yet been formulated. A study on the conditions determining the validity of unilateral acts, it was said, would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity.

587. The connection with a possible provision on revocation of unilateral acts was also pointed out. The point was made that if a unilateral act could be revoked, it was in the interest of the State to use that method rather than to invoke a cause of invalidity. The causes of invalidity, it was said, should essentially concern unilateral acts that were not revocable or, in other words, those linking the State formulating the act to another entity.

588. It was also suggested that a distinction should be drawn between cases where an act could be invalidated only if a ground for invalidity was invoked by a State (relative invalidity) and cases where the invalidity was a sanction imposed by law or stemmed directly from international law (absolute or *ex lege* invalidity). Error, fraud and corruption, which were the subject of paragraphs 1, 2 and 3 of draft article 5, could be invoked by States as causes of invalidity of unilateral acts formulated on their behalf. The same was true of the situation that paragraph 8 of draft article 5 was intended to cover, namely, that of the unilateral act conflicting with a norm of fundamental importance to the domestic law of the State formulating it.

589. In this connection, it was also suggested that the draft should contain a provision on the incapacity of the State formulating a unilateral act. Any unilateral commitment of a State that was incompatible with the status of that State would be devoid of legal validity. For example, if a neutral State formulated a unilateral act that was not consistent with its international obligations concerning neutrality the act would be invalid.

590. Also speaking generally on article 5, a view was expressed to the effect that the invalidation of a treaty or a unilateral act was the most far-reaching legal sanction available.

There were other less extreme ways in which a legal system could condemn an act, for example, through inopposability. If the Security Council imposed an arms embargo and certain States concluded an agreement or formulated a unilateral act to the contrary, the agreement or act would not be invalidated but would simply not be carried into effect. If rule A prevailed over rule B, it did not necessarily follow that rule B must be invalid. According to the jurisprudence of the European Court of Justice, where a rule of domestic law was incompatible with a rule of Community law, the domestic rule was not held to be invalid but was merely inapplicable in specific cases.

591. As a matter of drafting some members suggested that each ground of invalidity should be the object of a separate article accompanied by its own detailed commentary.

592. Regarding the chapeau of article 5, a suggestion was made to make it clear that the State invoking the invalidity of a unilateral act was the one that formulated the act.

593. On paragraph 1 concerning error as a ground of invalidity attention was drawn to the need for drafting the provision in such a manner as to disassociate it from treaty terminology under the 1969 Vienna Convention. It was suggested in this connection not to use the word "consent" because of its treaty connotations.

594. Paragraph 3, on corruption was welcome. Corruption, it was said, was being combated universally by legal instruments, such as the Inter-American Convention against Corruption, signed at Caracas. It was wondered, however, whether it was necessary to narrow down the possibility of corruption to "direct or indirect action by another State." The possibility could not be ruled out that the person formulating the unilateral act might be corrupted by another person or by an enterprise.

595. As regards paragraph 4 on coercion, the observation was made that the use of coercion on the person formulating the act was a special case, since, in those circumstances, the person involved was not expressing the will of the State he was supposed to represent, but that of the State using coercion. Without a will, there was no legal act and, if there was no act, there was nothing to be invalidated. Whereas other paragraphs were cases of *negotium nullum*, the paragraph in question was a case of *non negotium*.

596. Concerning paragraph 5 on use or threat of use of force and paragraph 6 on conflict with a peremptory norm of international law, the observation was made that they embodied causes of absolute invalidity stemming directly from the general international law and consequently acts falling under those two paragraphs were invalid *ab initio*.

597. With special reference to paragraph 6, the suggestion was made that the paragraph should take into account not only article 53 of the Vienna Convention on the Law of Treaties, but also article 64 of that Convention and that the definition of *jus cogens* could well be inserted into the draft.

598. Divergent views were expressed in connection with paragraph 7 on unilateral acts which conflict with a decision of the Security Council.

599. Some members supported the paragraph although, in their view, it did not go far enough. Thus, in one view, the paragraph should make it clear that a unilateral act should be invalid not only if it conflicted with a decision of the Security Council, but also if it went against the Charter of the United Nations. Furthermore, according to this view, an act should be invalid if it went against the rulings of international tribunals. In another view, a unilateral act could be invalidated not only if at the time of its formulation it conflicted with a decision of the Security Council, but also, at a later stage, if the Security Council's decision conflicting with the act was adopted after the formulation of the act. According to another view, Article 103 of the United Nations Charter stating that the obligations of the Charter would prevail was applicable not only to conflicting treaty provisions, but also to unilateral acts conflicting with obligations under the Charter.

600. Some members, although in principle supporting the paragraph, were of the view that its scope should be limited to unilateral acts conflicting with a decision of the Security Council adopted under Chapter VII of the United Nations Charter.

601. On the other hand, a number of members were strongly opposed to the inclusion of the paragraph. In their view, there was no reason why a distinction should be made in this area with the Vienna Convention on the Law of Treaties which kept a prudent silence on the matter. In their view, while it was true that under Article 103 of the United Nations Charter, obligations under the United Nations Charter would prevail over other treaty obligations, that did not mean that the treaty in question would be invalidated but only that specific provisions conflicting with the Charter would not be applicable. These members stressed that it had not been the intention of Article 103 to invalidate obligations under treaties. Those obligations might be suspended when a Charter obligation was activated by a Security Council decision but the treaty remained in force and became operative again once the Security Council decision was revoked. In the view of those members, the same should apply to unilateral acts.

602. Most members expressed doubts about paragraph 8 on unilateral acts conflicting with a norm of fundamental importance to the domestic law of the State formulating it. These doubts were increased by what some members termed as a lack of an appropriate commentary explaining the paragraph. In one view, the paragraph referred to the constitutional law of States, but, in a democracy, unilateral acts did not necessarily have to be ratified by national parliaments. The unilateral acts covered by the report were acts which had been formulated in some cases by the executive and could have an impact on legislative acts or on coordination between the different branches of government. In the view of some members, the paragraph, as drafted, might be interpreted as giving priority to domestic law over commitments under international law, and this would be unacceptable. Some members also wondered whether the paragraph might not lend itself to a situation whereby a State would utilize the provisions of its own national law to evade international obligations which it had assumed by a valid unilateral act.

603. A suggestion was made to formulate the paragraph in such a way so as to bring out the fact that, at the time of the formulation of the act, an internal norm of fundamental importance to domestic or constitutional law had been breached concerning the capacity to assume international obligations or to formulate legal acts at the international level.

4. Special Rapporteur's concluding remarks

604. The Special Rapporteur, summing up the debate, stated that the importance of the topic had been clearly reaffirmed and the fact that unilateral acts were being used more and more frequently in international relations had been generally acknowledged. Some doubt had been expressed, however, both in the Commission and in Government replies to the questionnaire, about whether common rules could be elaborated for all unilateral acts. To some degree he shared those doubts. Yet the definition and general rules on the formulation of unilateral acts contained in his report applied to all unilateral acts of States. Subsequent reports would comprise specific rules for the various unilateral acts, which he would attempt to categorize in his next report. One category might be acts whereby States assumed obligations, while another would be acts in which States acquired, rejected or reaffirmed a right. Such categorization of acts had been suggested by one member. As another had said, after the acts had been categorized, the legal effects and all matters pertaining to the application, interpretation and duration of acts whereby States contracted obligations could be considered.

605. The Special Rapporteur proposed that draft articles 1 to 4 be referred to the Drafting Committee for consideration in the light of the comments made on each article, whereas the Working Group should continue its in-depth study of article 5 on invalidity, including the idea that it should be preceded by provisions on the conditions for validity.

606. As to article 1, some saw that there had been an evolution from the restrictive approach taken in the first report to the present, much broader formulation. It had been a necessary transition, but because of it, the reaction of States to the article might differ from the position they had taken in the questionnaire. It had been suggested that he was hewing too closely to the Commission's line of thinking. Naturally, he had had his own ideas from the outset, but to try to impose them would be unrealistic. The effort to achieve consensus, no matter what he himself thought, was what counted. For example, in deference to the majority of opinion, he had removed certain terms from the definition that he had seen as worth keeping.

607. Some members had pointed to the possible tautology of "expression of will" and "intention" in article 1, but there was a clear-cut difference between the first term, which was the actual performance of the act, and the second, which was the sense given by the State to the performance of that act. The two were complementary and should be retained.

608. "Legal effects" was a broader concept than the "obligations", referred to in his first report, which failed to cover some unilateral acts. Some members had stated, however, that the concept was too broad and that the words "rights and obligations" should be used. That could be discussed in the Drafting Committee.

609. The draft articles referred to the formulation of unilateral acts by States, but that did not signify it was impossible to direct them, not only at other States or the international community as a whole, but also at international organizations. It had consequently been asked why they could not be directed at other entities. It was an interesting question, though he was somewhat concerned by the tendency throughout the United Nations system, and not just in the Commission, to include entities other than States in international relations. In reality, the responsibility regime applied solely to States, and it was perhaps not appropriate for entities other than States and international organizations to enjoy certain rights pursuant to obligations undertaken by a State. That point could be further examined by the Working Group.

610. Although a majority of members had suggested that the word "unequivocal" should be deleted, he continued to believe it was useful and should be retained, if only in the commentary, to explain the clarity with which the expression of will must be made.

611. The phrase "which is known to", used in preference to the earlier reference to publicity, was broader and more appropriate, but it had been challenged on the grounds that it was difficult to determine at what point something was known to a State. It had been suggested that the final clause containing that phrase should be replaced by wording drawn from the 1969 Vienna Convention on the Law of Treaties to indicate that the act was governed by international law.

612. Some members had mentioned the possibility of reinserting an article on the scope of the draft, as he had proposed in the previous report, and if the majority of members so agreed, such an article would have to be elaborated by the Drafting Committee in full conformity with article 1, on the definition of unilateral acts. It had also been suggested that the savings clause in article 3 of the earlier draft, which had been intended to prevent the exclusion of other unilateral acts, could be reincorporated. He believed, however, that the present definition of unilateral acts was sufficiently broad.

613. There had been no substantive criticisms of article 2.

614. Article 3, paragraph 2, was an innovation, representing some progressive development of international law, in that it spoke of persons other than Heads of State, Heads of Government and Ministers for Foreign Affairs, who could be considered authorized to act on behalf of the State. It seemed to have been generally accepted, although the Drafting Committee could look into the queries raised about the phrases "the practice of the States concerned" and "other circumstances".

615. The use of the word "expressly" in article 4 made it more restrictive than its equivalent in the 1969 Vienna Convention. It had led to some comments, the majority of members being in favour of a realignment with that instrument. That point, too, could be examined in the Working Group.

616. Article 5, on the invalidity of unilateral acts, would be considered in depth by the Working Group. Some members had made the very interesting suggestion that paragraph 7 of the article should refer not just to a decision of the Security Council but to a decision taken by that body under Chapter VII of the Charter. He had deliberately avoided including that specification because, without it, the paragraph also covered decisions by the Security Council when it established committees of enquiry under Chapter VI. That, too, could be discussed. One member had referred to the need to indicate who could invoke the invalidity of an act and therefore to distinguish between the various causes of invalidity.

617. A number of comments had been made about estoppel and silence. While there was perhaps little cause to include them in the materials on the formulation of unilateral acts, he believed they had to be covered in the context of State conduct and should therefore be included in Part II, on the legal effects of acts.

618. In response to the question whether any pattern could be discerned from the replies of Governments to the questionnaire (A/CN.4/511) the Special Rapporteur said that some of the replies had been critical of the treatment of the topic, but had been very useful, and the suggestion to provide an addendum to the commentaries would be taken into account in subsequent reports.

619. As a result of the debate, the Commission decided to reconvene the Working Group on unilateral acts of States. It also decided to refer draft articles 1 to 4 to the Drafting Committee and draft article 5 to the Working Group for further consideration and study.

5. Establishment of the Working Group

620. The Working Group on unilateral acts of States held two preliminary meetings during the first part of the Commission's session on 19 and 20 May 2000. Because of the time needed for the advancement of other topics, the Working Group was not in a position to hold further meetings and, in particular, could not yet consider draft article 5, on invalidity of unilateral acts, referred to it.

621. The Working Group reported that while, in the light of the above-mentioned circumstances, no final conclusions could be drawn from the meetings held, there was a strong measure of support in the Working Group for the following points concerning further work on the topic:

(a) The kind of unilateral acts with which the topic should be concerned are non-dependent acts in the sense that the legal effects they produce are not pre-determined by conventional or customary law but are established as to their nature and extent, by the will of the author State.

(b) The draft articles could be structured around a distinction between general rules which may be applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts.

(c) The Special Rapporteur could initiate the study of specific categories of unilateral acts by concentrating first on those acts which create obligations for the author State (promises), without prejudice to recognizing the existence of other categories of unilateral acts such as protest, waiver and recognition, which could be addressed at a later stage.

(d) Further efforts on the topic should pay particular attention to State practice. The Special Rapporteur and the Secretariat could, to the extent possible, continue efforts in gathering examples of State practice. Furthermore, in the light of the fact that only 12 States had replied to the questionnaire sent to Governments by the Secretariat in 1999 and that the replies received contain mostly views on the various points of the questionnaire but not enough materials of State practice, the Secretariat could renew its appeal to Governments which had not yet done so to reply to the questionnaire, stressing, in particular, the request that they furnish materials on their State practice.

622. The Commission did not have time to consider the report of the Working Group. However, the Commission agreed that it would be useful to seek the views of Governments on points (a), (b) and (c) above and that the Secretariat should proceed along the lines suggested in point (d) above.

CHAPTER VII

RESERVATIONS TO TREATIES

A. Introduction

623. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

624. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[128]

625. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[129]

626. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form the results of the study would take which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[130] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice is concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

627. In 1995, the Commission, in accordance with its earlier practice,[131] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly

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[128] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[129] A/CN.4/470 and Corr.1.

[130] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[131] See *Yearbook of the International Law Commission, 1993*, vol. II (Part Two), para. 286.

those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[132]

628. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic.[133] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[134] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

629. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

630. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[135]

631. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

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[132] As of 27 July 2000, 33 States and 24 international organizations had answered the questionnaire.

[133] A/CN.4/477 and Add.1.

[134] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[135] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

632. At its fiftieth session, the Commission had before it the Special Rapporteur's third report on the topic,[136] which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.[137]

633. At the fifty-first session, the Commission again had before it the part of the Special Rapporteur's third report which it had not had time to consider at its fiftieth session and his fourth report on the topic.[138] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted in 1996 attached to his second report,[139] was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations.

634. On the recommendation of the Drafting Committee, the Commission adopted on first reading at the same session draft guidelines 1.1.5 [1.1.6][140] ("Statements purporting to limit the obligations of their author"), 1.1.6 ("Statements purporting to discharge an obligation by equivalent means"), 1.2 ("Definition of interpretative declarations"), 1.2.1 [1.2.4] ("Conditional interpretative declarations"), 1.2.2 [1.2.1] ("Interpretative declarations formulated jointly"), 1.3 ("Distinction between reservations and interpretative declarations"), 1.3.2 [1.2.2] ("Phrasing and name"), 1.3.3 [1.2.3] ("Formulation of a unilateral statement when a reservation is prohibited"), 1.4 ("Unilateral statements other than reservations and interpretative declarations"), 1.4.1 [1.1.5] ("Statements purporting to undertake unilateral commitments"), 1.4.2 [1.1.6] ("Unilateral statements purporting to add further elements to a treaty"),

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[136] A/CN.4/491 and Corr.1 (English only), A/CN.4/491/Add.1, Add.2 and Add.2/Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only), Add.4 and Add.4/Corr.1, Add.5 and Add.6 and Corr.1.

[137] See Report of the International Law Commission on the work of its fiftieth session, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10, para. 540).

[138] A/CN.4/499.

[139] A/CN.4/478/Rev.1.

[140] The numbering in square brackets corresponds to the original numbering of the draft guidelines proposed by the Special Rapporteur.

1.4.3 [1.1.7] ("Statements of non-recognition"), 1.4.4 [1.2.5] ("General statements of policy"), 1.4.5 [1.2.6] ("Statements concerning modalities of implementation of a treaty at the internal level"), 1.5.1 [1.1.9] ("Reservations to bilateral treaties"), 1.5.2 [1.2.7] ("Interpretative declarations in respect of bilateral treaties") and 1.5.3 [1.2.8] ("Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party") and the commentaries thereto. Moreover, in the light of the consideration of interpretative declarations, it adopted a new version of draft guideline 1.1.1 [1.1.4] and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

B. Consideration of the topic at the present session

1. First part of the fifth report

635. At the present session, the Commission had before it the Special Rapporteur's fifth report on the topic A/CN.4/508 and Add.1-4 relating to alternatives to reservations and interpretative declarations and to the formulation, modification and withdrawal of reservations and interpretative declarations. The Commission considered the first part of the fifth report of the Special Rapporteur contained in A/CN.4/508 and Add.1 and 2 at its 2630th, 2631st, 2632nd, and 2633rd, meetings, on 31 May, 2, 6 and 7 June 2000.

636. At its 2632nd and 2633rd meetings on 6 and 7 June the Commission decided to refer to the Drafting Committee draft guidelines 1.1.8 (Reservations formulated under exclusionary clauses), 1.4.6 (Unilateral statements adopted under an optional clause), 1.4.7 (Restrictions contained in unilateral statements adopted under an optional clause), 1.4.8 (Unilateral statements providing for a choice between the provisions of a treaty), 1.7.1 (Alternatives to reservations), 1.7.2 (Different procedures permitting modification of the effects of the provisions of a treaty), 1.7.3 (Restrictive clauses), 1.7.4 (["Bilateralized reservations"] ["Agreements between States having the same object as reservations"]), and 1.7.5 (Alternatives to interpretative declarations).[141]

637. At its 2640th meeting, on 14 July 2000, the Commission considered and adopted on first reading draft guidelines 1.1.8 (Reservations made under exclusionary clauses), 1.4.6 [1.4.6, 1.4.7] (Unilateral statements made under an optional clause), 1.4.7 [1.4.8] (Unilateral

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[141] For the text of these draft guidelines see A/CN.4/508/Add.1 and Add.2.

statements providing for a choice between the provisions of a treaty), 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] (Alternatives to reservations) and 1.7.2 [1.7.5] (Alternatives to interpretative declarations). The text of these draft guidelines with the commentaries thereto is reproduced below in section C.

2. Second part of the fifth report

638. The Commission due to the lack of time deferred consideration of the second part of the fifth report of the Special Rapporteur contained in A/CN.4/508/Add.3 and Add.4, which was introduced by the Special Rapporteur at its 2651st meeting on 3 August 2000 and a summary of which is produced below.

639. The Special Rapporteur explained that the first part of the fifth report dealt with alternatives to reservations, i.e. different procedures for modifying or interpreting treaty obligations, whether of a conventional or of a unilateral nature, and relating to the chapter on definitions. The draft guidelines adopted by the Commission at the current session were thus the product of the discussions on legal procedures whose results were very close to those of reservations, thereby supplementing the chapter on definitions.

640. Part Two of the fifth report dealt with procedural matters regarding reservations and interpretative declarations, beginning with their formulation.

641. The Special Rapporteur recalled that the Commission had already discussed the moment when reservations and interpretative declarations are formulated when it had prepared the draft guidelines defining them, particularly draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Cases in which a reservation may be formulated), on account of the fact that the definition which is contained in the Vienna Conventions and which these draft guidelines reproduce includes temporal elements, as well as draft guideline 1.2.1 (Conditional interpretative declarations), which, in that regard, brings the definition of conditional interpretative declarations into line with that of reservations. Those clarifications did not, however, entirely solve all of the problems relating to the moment at which a reservation (or interpretative declaration) can (or must) be formulated and the present part of the fifth report was thus devoted precisely to the questions left pending.

642. The Special Rapporteur first indicated the problems with which his report did not deal:

- Following his original outline,[142] his report dealt with the strictly procedural aspects of the formulation of reservations and interpretative declarations, and not, for example, with the consequences or effects of an incorrect procedure, which would be discussed during the consideration of the question of the permissibility of reservations;
- The report thus related only to the formulation of reservations (and interpretative declarations) and not to the issue of the correctness or incorrectness of such formulation.

643. With regard to the use of the terms "make" and "formulate" reservations, the Special Rapporteur explained that the former term referred to reservations which were sufficient in themselves, complete, as it were, and produced effects, while the latter applied to "proposed" reservations, i.e. reservations which did not meet all the conditions required to produce their full effects (whatever they might be). It was in this sense and not at all by chance that the two terms were used in the 1969 Vienna Convention (arts. 19-23), except, no doubt, in article 2 (d), in which the word "make" was used erroneously.

644. The part of the report under consideration also dealt only with the moment of formulation and not with the moment at which a reservation could be modified. The Special Rapporteur was of the opinion that, since the modification of a reservation was in the majority of cases a diluted form of withdrawal, it should be considered at the same time as the withdrawal of reservations.

645. Turning to the draft guidelines submitted in addenda 3 and 4 to his fifth report, the Special Rapporteur began with draft guideline 2.2.1 entitled "Reservations formulated when

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[142] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 114, p. 186.

signing and formal confirmation".[143] This draft guideline is based on article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions; this reflects the "practical" nature of the Guide and is in keeping with the Commission's decision not to amend the relevant provisions of the Vienna Conventions.[144]

646. The Special Rapporteur explained that, at the 1968-1969 Vienna Conference, the principle of the formal confirmation of a reservation when expressing consent to be bound was more akin to the progressive development of international law, but, since then, had become a generally accepted rule reflecting the prevailing practice. It had both advantages and some disadvantages.

647. Among the former, he drew attention to the clarity, security and precision that the rule introduced in treaty relations. It did, however, involve a risk of discouraging States (and international organizations) from formulating reservations at the time of the adoption or signing of a treaty, thereby indicating quite early to the other (potential) parties the exact scope of the commitments they intended to assume.

648. In the light of these considerations, the Special Rapporteur had questioned whether it might not be a good idea to reformulate the text of article 23, paragraph 2, of the Vienna Conventions; ultimately, he decided to reproduce the text of the 1986 Convention (which, compared to the 1969 text, had the advantage of also covering international organizations) and to provide the necessary explanations in the following draft guidelines. The Special Rapporteur recalled that all matters relating to situations of State succession would be dealt with in a separate chapter of the Guide to Practice and that, consequently, they did not have to be mentioned in that draft guideline.

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[143] Text of the guideline reads:

> 2.2.1 Reservations formulated when signing and formal confirmation
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> If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

A/CN.4/508/Add.3, para. 251.

[144] See *Yearbook ... 1995*, vol. II (Part Two), para. 487.

649. In order to supplement and further clarify the text of the Vienna Conventions, the Special Rapporteur proposed draft guideline 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation).[145] The Special Rapporteur recalled that this draft guideline basically reproduced what the International Law Commission had had in mind in draft article 19 (which became article 23 of the 1969 Vienna Convention) and which had unfortunately and "mysteriously" disappeared during the Vienna Conference. This draft guideline was all the more justified in that it reflected the prevailing practice by which statements of reservations were made at various stages in the conclusion of a treaty.

650. Draft guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed])[146] was a logical extension of the preceding draft guidelines and also had a place in the Guide to Practice because of the pedagogical and utilitarian nature of the Guide.[147]

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[145] Text of the guideline reads:

> 2.2.2 Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation
>
> If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

A/CN.4/598/Add.3, para. 256.

[146] Text of the guideline reads:

> 2.2.3 Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]
>
> A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

Ibid., para. 260.

[147] The alternatives proposed in the title and in the text of this draft guideline were the result of the fact that the concept of "in simplified form" seems to be more commonly accepted in Roman than in common law legal systems.

651. Draft guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision)[148] also meets a logical need and reflects a common, if somewhat slightly uncertain, practice. If the treaty provides[149] that a reservation may be made upon signing, the reservation does not have to be confirmed at the time of the expression of consent to be bound, although, erring on the side of caution, many States have done so. The purpose of this draft guideline is precisely to dispel these uncertainties by reflecting the prevailing practice.

652. The Special Rapporteur then went on to discuss the important problem of *late reservations*, which are the subject of draft guideline 2.3.1 (Reservations formulated late).[150]

653. In view of the fact that, unless the treaty provides otherwise, the last time at which reservations may be made is that of the expression of consent to be bound,[151] reservations formulated after that time are ordinarily inadmissible. The stringency of this principle is attested to by precedents, as shown by a number of cases decided by various international and even

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[148] Text of the guideline reads:

> 2.2.4 Reservations formulated when signing for which the treaty makes express provision
>
> A reservation formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate a reservation at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

A/CN.4/508/Add.3, para. 264.

[149] One of many examples is the 1963 Council of Europe Convention on reduction of cases of multiple nationality.

[150] Text of the guideline reads:

> 2.3.1 Reservations formulated late
>
> Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty unless the other contracting Parties do not object to the late formulation of the reservation.

A/CN.4/508/Add.4, para. 310.

[151] Cf. *Border and Transborder Armed Actions case, I.C.J. Reports*, 1988, p. 85.

national courts.[152] States can, for example, therefore not get round the principle, whether by interpretation of a reservation made later[153] or by restrictions or conditions contained in a statement made under an optional clause.[154] These consequences of the principle excluding late reservations are embodied in another draft guideline (2.3.4) (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations).[155]

654. However rigorous it may be, this principle is not absolute; it may be overridden by the unanimous (and even tacit) consent of the other parties to the treaty. In this regard, the Special Rapporteur referred to examples of treaties which provide for the possibility of reservations made after the expression of consent to be bound[156] and on which he based the drafting of model clauses[157] accompanying draft guideline 2.3.1.

655. He also cited the practice of several depositaries, beginning with that of the Secretary-General of the United Nations (as well as other depositaries such as the International Maritime Organization, the Council of Europe and the Customs Cooperation Council), which

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[152] Cf. e.g. Swiss Federal Tribunal, *Elizabeth B. v. Council of State of Thurgau Canton*, decision of 17 December 1992, *Journal des Tribunaux*, 1995, p. 536.

[153] Cf. the 1983 opinion of the Inter-American Court of Human Rights in the *Restrictions to the Death Penalty case*.

[154] Cf. the position taken by the Commission and the European Court of Human Rights in the *Chrysostomos* and *Loizidou cases*.

[155] Text of the guideline reads:

> 2.3.4 Late exclusion or modification of the legal effects of a treaty by procedures other than reservations
>
> Unless otherwise provided in the treaty, a contracting party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:
>
> (a) Interpretation of a reservation made earlier; or
>
> (b) A unilateral statement made under an optional clause.

A/CN.4/508/Add.3, para. 286.

[156] Cf. A/CN.4/508/Add.3, para. 289.

[157] In accordance with the intention the Commission expressed in 1995. See *Yearbook ... 1995*, vol. II (Part Two), para. 487 (b), p. 108.

reflects the principle of the unanimity of the tacit consent of the other contracting parties to the formulation of late reservation (a requirement of express acceptance would have the result of completely paralysing the system of late reservations) and, consequently, the setting aside of the normal rule of inadmissibility, which is not of a peremptory nature. This flexible attitude of the depositaries has no doubt made it possible in some cases to prevent the outright denunciation of the treaty in question.

656. Towards the end of the 1970s, the Secretary-General of the United Nations inaugurated his current practice by giving the parties a 90-day period in which to object to a late reservation. Since the Secretary-General had recently extended that period to 12 months, the Special Rapporteur was proposing that the Commission should agree to that time limit (draft guideline 2.3.2 (Acceptance of reservations formulated late)),[158] noting, however, that it might seem rather long because there would thus be uncertainty about the fate of the late reservation.

657. As a result of that practice, moreover, only a single objection to the formulation of a late reservation prevents it from producing its effects, as reflected in draft guideline 2.3.3 (Objection to reservations formulated late).[159] It had been suggested in the literature that objections to late reservations would have the same effect as objections to reservations formulated "on time" and that an objection would prevent the late reservation from producing its effects only as between

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[158] Text of the guideline reads:

> 2.3.2 Acceptance of reservations formulated late
>
> Unless the treaty provides otherwise or the usual practice followed by the depository differs, a reservation formulated late shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

A/CN.4/508/Add.4, para. 325.

[159] Text of the guideline reads:

> 2.3.3 Objection to reservations formulated late
>
> If a contracting Party to a treaty objects to a reservation formulated late, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being made.

Ibid., para. 313.

the reserving State and the objecting State, but the Special Rapporteur did not share that view. Such an approach would lead to the negation of all the rules relating to time limits on reservations and would ultimately undermine the principle of "*pacta sunt servanda*". It is also not in keeping with the practice followed by the Secretary-General of the United Nations, who considers that a single objection is enough to prevent the reservation from being made. This practice is reflected in draft guideline 2.3.3.

658. The Special Rapporteur pointed out that, in principle, unless the treaty provides otherwise,[160] interpretative declarations may be formulated at any time. This was, moreover, in keeping with the definition of interpretative declarations (draft guideline 1.2), which does not contain any time element, and was the subject of draft guideline 2.4.3 (Times at which an interpretative declaration may be formulated).[161] Draft guideline 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision) and draft guideline 2.4.7 (Interpretative declarations formulated late) govern cases where the treaty itself contains a restrictive clause in this regard.[162]

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[160] There are many examples: cf. article 310 of the 1982 United Nations Convention on the Law of the Sea or article 43 of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

[161] Text of the guideline reads:

> 2.4.3 Time at which an interpretative declaration may be formulated
>
> Without prejudice to the provisions of guidelines 1.2.2, 2.4.4, 2.4.7 and 2.4.8, an interpretative declaration may be formulated at any time, [unless otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].

A/CN.4/508/Add.3, para. 278.

[162] Texts of the guidelines read:

> 2.4.5 Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]
>
> An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

659. In view of the nature of conditional interpretative declarations, which makes them quite close to reservations,[163] the Special Rapporteur considered that the rules embodied in draft guidelines 2.3.1 to 2.3.3 in respect of reservations might be transposed to conditional interpretative declarations. Draft guideline 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation) and draft guideline 2.4.8 (Conditional interpretative declarations formulated late) followed on logically.[164]

> 2.4.6 Interpretative declarations formulated when signing for which the treaty makes express provision
>
> An interpretative declaration formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate such a declaration at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.
>
> 2.4.7 Interpretative declarations formulated late
>
> Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other contracting Parties.

Ibid., paras. 273 and 331.

[163] See paragraph (14) of the commentary to draft guideline 1.2.1, *Official Records of the General Assembly, Supplement No. 10* (A/54/10), pp. 247-248.

[164] Texts of the guidelines read:

> 2.4.4 Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation
>
> If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a conditional interpretative declaration must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the declaration shall be considered as having been made on the date of its confirmation.

660. In concluding his introduction, the Special Rapporteur proposed that the 14 draft guidelines contained in the present part of the fifth report should be referred to the Drafting Committee.

661. Owing to the lack of time, the Commission was unable to consider either this part of the report or the relevant draft guidelines and model clauses. It decided to defer the discussion of the topic until next year.

C. Text of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading

1. Text of the draft guidelines

662. The text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions is reproduced below:

RESERVATIONS TO TREATIES

Guide to Practice

1. Definitions

1.1 Definition of reservations[165]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

2.4.8 Conditional interpretative declarations formulated late

A State or an international organization may not formulate a conditional interpretative declaration on a treaty after expressing its consent to be bound by the treaty unless the late formulation of the declaration does not elicit any objections from the other contracting Parties.

A/CN.4/508/Add.3-4, paras. 272 and 331.

[165] For the commentary see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

1.1.1 [1.1.4][166] Object of reservations[167]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[168]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[169]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[170]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[171]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

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[166] The numbers in square brackets refer to the numbering adopted in the reports of the Special Rapporteur.

[167] For the commentary see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[168] For the commentary see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

[169] For the commentary, ibid., pp. 206-209.

[170] For the commentary, ibid., pp. 209-210.

[171] For the commentary see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

1.1.6 Statements purporting to discharge an obligation by equivalent means[172]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[173]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[174]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of interpretative declarations[175]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[176]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a

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[172] For the commentary, ibid., pp. 222-223.

[173] For the commentary see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[174] For the commentary see section 2 below.

[175] For the commentary see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[176] For the commentary, ibid., pp. 240-249.

State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[177]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[178]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[179]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] Phrasing and name[180]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

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[177] For the commentary, ibid., pp. 249-252.

[178] For the commentary, ibid., pp. 252-253.

[179] For the commentary, ibid., pp. 254-260.

[180] For the commentary, ibid., pp. 260-266.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[181]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[182]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[183]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[184]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[185]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

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[181] For the commentary, ibid., pp. 266-268.

[182] For the commentary, ibid., pp. 268-270.

[183] For the commentary, ibid., pp. 270-273.

[184] For the commentary, ibid., pp. 273-274.

[185] For the commentary, ibid., pp. 275-280.

1.4.4 [1.2.5] General statements of policy[186]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[187]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause[188]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

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[186] For the commentary, ibid., pp. 280-284.

[187] For the commentary, ibid., pp. 284-289.

[188] For the commentary see section 2 below.

1.5 Unilateral statements in respect of bilateral treaties[189]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[190]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[191]

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[192]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions[193]

The definitions of unilateral statements included in the present chapter of the Guide to practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

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[189] For the commentary see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[190] For the commentary, ibid., pp. 290-302.

[191] For the commentary, ibid., pp. 302-306.

[192] For the commentary, ibid., pp. 306-307.

[193] For the commentary, ibid., pp. 308-310.

1.7 Alternatives to reservations and interpretative declarations[194]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations[195]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

2. Texts of the draft guidelines with commentaries thereto adopted at the fifty-second session of the Commission

663. The text of the draft guidelines, adopted by the Commission at its fifty-second session, with commentaries thereto are reproduced below:

1.1.8 Reservations made under exclusionary clauses

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

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[194] For the commentary see section 2 below.

[195] Ibid.

Commentary

(1) According to a widely accepted definition, an exclusionary or opting-[or contracting-]out clause is a treaty provision by which a State will be bound by rules contained in the treaty unless it expresses its intent not to be bound, within a certain period of time, by some of those provisions.[196]

(2) Such exclusionary clauses (opting or contracting out) are quite common. Samples can be found in the conventions adopted under the auspices of The Hague Conference on Private International Law,[197] the Council of Europe,[198] the ILO[199] and in various other

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[196] Cf. Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours de l'Académie de droit international*, 1994-VI, vol. 250, p. 329; see also Christian Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des cours de l'Académie de droit international*, 1993, vol. 241, pp. 264 et seq.

[197] Cf. article 8, first subparagraph, of the Convention of 15 June 1955 relating to the settlement of conflicts between the law of nationality and the law of domicile: "Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may declare that it excludes the application of this Convention to disputes between laws relating to certain matters"; see also article 9 of The Hague Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and foundations.

[198] Cf. article 34, paragraph 1, of the European Convention for the peaceful settlement of disputes of 29 April 1957: "On depositing its instrument of ratification, any one of the High Contracting Parties may declare that it will not be bound by: (a) Chapter III relating to arbitration; or (b) Chapters II and III relating to conciliation and arbitration"; see also article 7, paragraph 1, of the Council of Europe Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 6 May 1963: ("Each Contracting Party shall apply the provisions of Chapters I and II. It is however understood that each Contracting Party may declare, at the time of ratification, acceptance or accession, that it will apply the provisions of Chapter II only. In this case the provisions of Chapter I shall not be applicable in relation to that Party"); and article 25, first subparagraph, of the European Convention on Nationality of 6 November 1997: ("Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of this Convention"), etc. For other examples, see Sia Spiliopoulo Åkermark, "Reservation clauses in treaties concluded within the Council of Europe", *ICLQ*, 1999, pp. 504-505.

[199] Cf. article 2 of International Labour Convention No. 63 of 1938, concerning statistics of wages and hours of work: "1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude from its acceptance of the Convention: (a) any one of Parts II, III or IV; or (b) Parts II and IV; or (c) Parts III and IV".

conventions. Among the latter, one may cite by way of example article 14, paragraph 1, of the London Convention of 2 November 1973 for the Prevention of Pollution from Ships:

> "A State may, at the time of signing, ratifying, accepting, approving or acceding to the present Convention declare that it does not accept any one or all of Annexes III, IV and V (hereinafter referred to as 'Optional Annexes') of the present Convention. Subject to the above, Parties to the Convention shall be bound by any Annex in its entirety".[200]

(3) The question whether or not statements made in application of such exclusionary clauses are reservations is controversial. The strongest argument that they are not clearly derives from the ILO's consistent strong opposition to such an assimilation, even though that organization regularly resorts to the opting-out procedure. In its reply to the Commission's questionnaire, the ILO wrote:

> "It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, 'this basic proposition of refusing to recognize any reservations is as old as ILO itself' (see W.P. Gormley, 'The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe', *Fordham Law Review*, 1970, p. 65). The practice is not based on any explicit legal provision of the Constitution, the Conference Standing Orders, or the international labour Conventions, but finds its logical foundation in the specificity of labour Conventions and the tripartite structure of the Organization. Reference is usually made to two Memoranda as being the primary sources for such firm principle: first, the 1927 Memorandum submitted by the ILO Director to the Council of the League of Nations on the Admissibility of Reservations to General Conventions, and second, the 1951 Written Statement of the International Labour Organization in the context of the ICJ proceedings concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

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[200] The provisions which follow are cited by way of example and in no way exhaust the list of exclusionary clauses of conventions adopted in these forums. For other examples, see, in general, P.H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, pp. 171-172.

"In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director-General wrote with respect to labour Conventions:

> 'these agreements are not drawn up by the Contracting States in accordance with their own ideas: they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-government representatives. Reservations would still be inadmissible, even if all the States interested accepted them, for the rights which the treaties have conferred on non-governmental interests in regard to the adoption of international labour Conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the Conventions' (see League of Nations, *Official Journal*, 1927, at p. [882]).

"In the same vein, the ILO Memorandum, submitted to the ICJ in 1951, read in part:

> 'international labour conventions are adopted and enter into force by a procedure which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation. It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during the period from 1920-1946 when the League was responsible for the registration of ratifications of international labour conventions'
> (see *ICJ Pleadings, 1951*, at pp. 217, 227-228).

"Wilfred Jenks, Legal Adviser of the ILO, addressing in 1968 the United Nations Vienna Conference on the Law of Treaties, stated the following:

> 'reservations to international labour Conventions are incompatible with the object and purpose of these Conventions. The procedural arrangements concerning reservations are entirely inapplicable to the ILO by reason of its tripartite character as an organization in which, in the language of our Constitution, "representatives of employers and workers" enjoy "equal status with those of governments". Great flexibility is of course necessary in the application of

> certain international labour Conventions to widely varying circumstances, but the provisions regarded by the collective judgement of the International Labour Conference as wise and necessary for this purpose are embodied in the terms of the Conventions and, if they prove inadequate for the purpose, are subject to revision by the Conference at any time in accordance with its regular procedures. Any other approach would destroy the international labour code as a code of common standards'.

"In brief, with relation to international labour Conventions, a member State of the ILO must choose between ratifying without reservations and not ratifying. Consistent with this practice, the Office has on several occasions declined proffered ratifications which would have been subject to reservations (for instance, in the 1920s, the Governments of Poland, India and Cuba were advised that contemplated ratifications subject to reservations were not permissible, see *Official Bulletin*, vol. II, p. 18, and vol. IV, pp. 290-297). Similarly, the Organization refused recognition of reservations proposed by Peru in 1936. In more recent years, the Office refused to register the ratification of Convention No. 151 by Belize as containing two true reservations (1989). In each instance, the reservation was either withdrawn or the State was unable to ratify the Convention.

"It is interesting to note that, in the early years of the Organization, the view was taken that ratification of a labour Convention might well be made subject to the specific condition that it would only become operative if and when certain other States would have also ratified the same Convention (see International Labour Conference, 3rd session, 1921, at p. 220). In the words of the ILO Director-General in his 1927 Memorandum to the Council of the League of Nations,

> 'these ratifications do not really contain any reservation, but merely a condition which suspends their effect, when they do come into force, their effect is quite normal and unrestricted. Such conditional ratifications are valid, and must not be confused with ratifications subject to reservation which modify the actual substance of conventions adopted by the International Labour Conference' (for examples of ratifications subject to suspensive conditions, see Written Statement of the ILO in *Genocide Case, ICJ Pleadings, 1951*, at pp. 264-265).

There is no record of recent examples of such a practice. In principle, all instruments of ratification take effect 12 months after they have been registered by the Director-General.

"Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, even required, to attach declarations - optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide Case* read, 'they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations' (see *ICJ Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have 'for all practical purposes the same operational effect as reservations' (see Gormley, op. cit., *supra*, at p. 75)."[201]

(4) In the Commission's view, this reasoning reflects a respectable tradition, but is somewhat less than convincing:

- In the first place, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature;
- Secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of unilateral statements made in application of an exclusionary clause: the revised convention could not be imposed against their will on States that had made such statements when becoming parties to the original convention, and it matters little in such cases whether or not those statements were reservations;
- Lastly, and most importantly, the position traditionally taken by ILO reflects a restrictive view of the concept of reservations which is not reflected in the Vienna Conventions and the present Guide to Practice.

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[201] Reply to the questionnaire, pp. 3-5.

(5) In fact, the Vienna Conventions do not preclude the making of reservations, not on the basis of an authorization implicit in the general international law of treaties, as codified in articles 19 to 23 of the 1969 and 1986 Conventions, but on the basis of specific treaty provisions This is quite clear from article 19 (b) of the Conventions, which concerns treaties that provide "that only *specified* reservations may be made", or article 20, paragraph 1, which stipulates that "a reservation *expressly authorized* by a treaty does not require any subsequent acceptance "

(6) The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author[202] is specifically provided for by a treaty is not sufficient to characterize such a statement as either being or not being a reservation This is precisely the object of "reservation clauses" that can be defined as "treaty provisions [setting] limits within which States should [[203]] formulate reservations and even the content of such reservations" [204]

(7) In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the "specified" reservations "expressly authorized" by a treaty, including international labour conventions [205] They are indeed unilateral statements made at the time consent to be bound[206] is expressed and purporting to exclude the legal effect of

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[202] Cf draft guidelines 1.1 and 1.1.1

[203] It would be more accurate to use the word "may"

[204] Pierre-Henri Imbert, op cit , p 12

[205] At the same time, there is little doubt that a practice accepted as law has developed in the ILO Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible This is also clearly the case with regard to the conventions adopted by The Hague Conference of Private International Law (see Georges A L Droz, "*Les réserves et les facultés dans les Conventions de La Haye de droit international privé*", *RCDIP 1969*, pp 388-392) However, this is an altogether different question from that of defining reservations

[206] With regard to statements made in application of an exclusionary clause, but following its author's expression of consent to be bound, see para (18) of the commentary below

certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least, it would seem that they are not and need not be subject to a separate legal regime.

(8) Except for the absence of the word "reservations", there appears to be little difference between the aforementioned exclusionary clauses[207] and what are indisputably reservation clauses, such as article 16 of The Hague Convention of 14 March 1970 on celebration and recognition of the validity of marriages,[208] article 33 of the Convention concluded on 18 March 1978 in the context of The Hague Conference on Private International Law, on the taking of evidence abroad in civil or commercial matters[209] and article 35, entitled "Reservations", of the Lugano Convention of the Council of Europe of 21 June 1993, on civil liability for damages resulting from activities dangerous to the environment.[210] It is thus apparent that, in both their form and their effects,[211] the statements made when expressing consent to be bound under exclusionary clauses are in every way comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.[212]

(9) Some members of the Commission questioned whether the fact that a State party cannot object to a statement made under such an exclusionary clause does not rule out the classification of such a statement as a reservation. This is no doubt true of every reservation formulated under

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[207] See para. (2) of the commentary.

[208] "A Contracting State may reserve the right to exclude the application of Chapter I" (art. 28 provides for the possibility of "reservations").

[209] "A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of article 4 and of Chapter II. No other reservation shall be permitted."

[210] "Any signatory may declare, at the time of signature or when depositing its instrument of ratification, acceptance or approval, that it reserves the right ... '(c) not to apply article 18'".

[211] See W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, 1970-1971, pp. 75-76.

[212] See Pierre-Henri Imbert, op. cit., p. 169, and Sia Spiliopoulo Åkermark, op. cit., pp. 505-506.

a reservation clause: once a reservation is expressly provided for in a treaty, the contracting States know what to expect; they have accepted in advance the reservation or reservations concerned in the treaty itself. It thus appears that the rules in article 20 on both acceptance of reservations and objections to them do not apply to reservations expressly provided for, including opting-out clauses or exclusionary provisions.[213] This is, moreover, not a problem of definition, but one of legal regime.

(10) Other members asked whether the classification of statements made under an opting-out clause as reservations was compatible with article 19 (b) of the Vienna Conventions, according to which a reservation cannot be formulated if the treaty provides that "only specified reservations, which do not include the reservation in question, may be made". However, article 19 (b) does not say that all other reservations are prohibited if some are expressly provided for; it does say that other reservations are prohibited if the treaty provides that only specified reservations may be made.

(11) In reality, exclusionary clauses take the form of "negotiated reservations", as the term is currently (and erroneously) accepted in the context of The Hague Conference on Private International Law and further developed in the context of the Council of Europe.[214] "Strictly speaking, this means that it is the *reservation* - and not only the right to make one - that is the subject of the negotiations."[215] These, then, are not "reservations" at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated.

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[213] Conversely, States may "object" to some statements (for example, statements of non-recognition), but that does not make such statements reservations.

[214] See Georges A.L. Droz, op. cit., pp. 385-388, Héribert Golsong, "*Le développement du droit international régional*" in SFDI, Colloque de Bordeaux, *Régionalisme et universalisme dans le droit international contemporain*, 1997, p. 228, and Sia Spiliopoulo Åkermark, op. cit., pp. 489-490.

[215] Pierre-Henri Imbert, op. cit., p. 196. The term is used in the Council of Europe in a broader sense, seeking to cover the "*procedure* intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation" (Héribert Golsong, op. cit., p. 228 (emphasis added); see also Sia Spiliopoulo Åkermark, op. cit., p. 498 and also pp. 489-490).

(12) It is true that, in some conventions (at least those of the Council of Europe), exclusionary ***and*** reservation clauses are present at the same time.[216] This is probably more a reflection of terminological vagueness, than of a deliberate distinction.[217] And it is striking that, in its reply to the Commission's questionnaire, the ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European Convention for the peaceful settlement of disputes, since the word "reservation" does not even appear in this standard exclusionary clause.[218]

(13) The case covered in draft guideline 1.1.8 is the same as that dealt with in article 17, paragraph 1, of the 1969 and 1978 Vienna Conventions:

> "Without prejudice to articles 19 to 23, the consent of a State [or of an international organization] to be bound by part of a treaty is effective only if the treaty so permits ..."

(14) This provision, which was adopted without change by the 1968-1969 Vienna Conference,[219] is contained in part II, section 1 (Conclusion of treaties), and creates a link with articles 19 to 23 dealing specifically with reservations. It is explained by the International Law Commission as follows in its final report of 1966 on the draft articles on the law of treaties:

> "Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible. But in the absence of such a provision, the established rule is that the ratification, accession etc. must relate to the treaty as a whole.

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[216] See arts. 7 (note 198 above) and 8 of the Council of Europe Convention of 1968 on reduction of cases of multiple nationality and the examples given by Sia Spiliopoulo Åkermark, op. cit., p. 506, note 121.

[217] Moreover, the fact that certain multilateral conventions prohibit any reservations while allowing some statements which may be equated with exclusionary clauses (see art. 124 of the Statute of the International Criminal Court of 17 July 1998) is not in itself decisive; it too is no doubt more the result of terminological vagueness than of an intentional choice aimed at achieving specific legal effects.

[218] See note 198 above.

[219] See *United Nations Conference on the Law of Treaties, first and second sessions (Vienna, 26 March-24 March 1968 and 9 April-2 May 1969)*, Documents of the Conference (A/CONF.39/11/Add.2) (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole, paras. 156-157, pp. 129-130.

> Although it may be admissible to formulate reservations to selected provisions of the treaty under the rule stated in article 16 [19 in the text of the Convention], it is inadmissible to subscribe only to selected parts of the treaty. Accordingly, paragraph 1 of the article lays down that, without prejudice to the provisions of articles 16 to 20 [19 to 23] regarding reservations to multilateral treaties, an expression of consent by a State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent."[220]

(15) The expression "without prejudice to articles 19 to 23" in article 17 of the 1969 and 1986 Vienna Conventions implies that, in some cases, options amount to reservations.[221] Conversely, it would appear that this provision is drafted so as not to imply that all clauses that offer parties a choice between various provisions of a treaty *are* reservations.

(16) This is certainly true of statements made under an optional clause or a clause providing for a choice between the provisions of a treaty, as indicated in guidelines 1.4.6 and 1.4.7. But it might also be asked whether it is not also true of certain statements made under certain exclusionary clauses, which, while having the same or similar effects as reservations, are not reservations in the strict sense of the term, as defined in the Vienna Conventions and the Guide to Practice.

(17) It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty's provisions in their application to the author of the statement, not (or not only) at the time of expression of consent to be bound, but after the treaty enters into force for them. For example:

- Article 82 of the International Labour Convention on minimum standards authorizes a member State that has ratified the Convention to denounce, 10 years after the entry into force of the Convention, either the entire Convention or one or more of Parts II to X.

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[220] *Yearbook ... 1966*, vol. II, pp. 219-220.

[221] See Sia Spiliopoulo Åkermark, op. cit., p. 506.

- Article 22 of The Hague Convention of 1 June 1970 on the recognition of divorces and legal separations authorizes contracting States, "*from time to time*, [to] declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention";[222]
- Article 30 of The Hague Convention of 1 August 1989 on successions stipulates that "A State Party to this Convention may denounce it, *or only Chapter III of the Convention*, by a notification in writing addressed to the depositary;"
- Article X of the ASEAN Framework Agreement on Services of 4 July 1996 authorizes a member State to modify or withdraw any commitment in its schedule of specific commitments, subject to certain conditions, at any time after three years from the date on which that commitment entered into force.

(18) Unilateral statements made under provisions of this type are certainly not reservations.[223] In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive insofar as nothing prevents negotiators from departing from the provisions of the Vienna Conventions, which are merely residual in nature. Nevertheless, statements made under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19 to 23 of the Vienna Conventions in part II, relating to the conclusion and entry into force of treaties. They are partial acceptances of the provisions of the treaty to which they relate, and that is why it seems logical to consider statements made at the time of expressing consent to be bound as being reservations. On the other hand, statements made after the treaty has been in force for a certain period of time in respect of their author are

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[222] Concerning the circumstances under which this provision was adopted, see Georges A.L. Droz, op. cit., pp. 414-415. This, typically, is a "negotiated reservation" in the sense referred to in para. (11) of the commentary.

[223] Significantly, article 22, already cited, of the Convention on the recognition of divorces and legal separations, of the 1970 Hague Conference, is omitted from the list of reservation clauses given in article 25.

partial denunciations which, in their spirit, are much more closely related to part V of the Vienna Conventions concerning invalidity, termination and suspension of the operation of treaties. They may also be linked to article 44, paragraph 1, which does not exclude the right of a party to withdraw partially from a treaty if the treaty so provides.

(19) Such statements are expressly excluded from the scope of draft guideline 1.1.8 by the words "when that State or organization expresses its consent to be bound", which draw on draft guideline 1.1.2 relating to "Cases in which a reservation may be formulated".

1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause

> A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.
>
> A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

Commentary

(1) Draft guideline 1.4.6 deals jointly with unilateral statements made under an optional clause in a treaty and with the restrictions or conditions that frequently accompany such statements and are commonly characterized as "reservations", although this procedure differs in many respects from reservations as defined by the 1969, 1978 and 1986 Vienna Conventions and by the present Guide to Practice.

(2) The unilateral statements referred to in the first paragraph of draft guideline 1.4.6 may seem similar to those mentioned in draft guideline 1.1.8, i.e. those made under an exclusionary clause. In both cases, the treaty expressly provides for such statements, which the parties are free to make in order to modify the obligations imposed on them by the treaty. However, they are also very different in nature: while statements made under an exclusionary clause (or an opting-out or contracting-out clause) purport to exclude or modify the legal effect of certain provisions of the treaty as they apply to the parties who have made them and must therefore be viewed as genuine reservations, those made under optional clauses have the effect of increasing the declarant's obligations beyond what is normally expected of the parties under the treaty and do not affect its entry into force in their case.

(3) The purpose of optional clauses or opting-in [or contracting-in] clauses, which may be defined as provisions stipulating that the parties to a treaty may accept obligations which, in the absence of explicit acceptance, would not be automatically applicable to them, is not to reduce, but to increase, the obligations arising from the treaty for the author of the unilateral statement.[224]

(4) The most famous optional clause is certainly Article 36, paragraph 2, of the Statute of the International Court of Justice,[225] but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty, as envisaged in article 41, paragraph 1, of the 1966 International Covenant on Civil and Political Rights,[226] or are

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[224] According to Michel Virally, these are clauses "to which the parties accede only through special acceptance as distinct from accession to the treaty as a whole" ("Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'Homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, p. 13).

[225] "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. The interpretation of a treaty; b. Any question of international law; c. The existence of any fact which, if established, would constitute a breach of an international obligation; d. The nature or extent of the reparation to be made for the breach of an international obligation."

[226] "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant ..."; see also the former articles 25 (acceptance of the right to address individual petitions to the Commission) and 46 (acceptance of inter-State declarations) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (these articles have been modified, to provide for automatic compulsory jurisdiction, by articles 33 and 34 of Protocol No. 11 of 11 May 1994) or article 45, paragraph 1, of the American Convention on Human Rights: "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

exclusively prescriptive in nature, as in the case, for example, of article 25 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations.[227]

(5) Despite some academic opinions to the contrary,[228] in reality, statements made under such clauses have little in common, at the technical level, with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty and it is quite clear that "opt-out clauses seem to be much closer to reservations than opt-in clauses".[229] Indeed, not only can

(a) Statements made under optional clauses be formulated, in most cases, at any time, but also,

(b) Optional clauses "start from a presumption that parties are not bound by anything other than what they have explicitly chosen",[230] while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and

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[227] "Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this article, to an official deed ("*acte authentique*") drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds"; see also articles 16 and 17, paragraph 2, of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, or article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, or article 4, paragraphs 2 and 4, of ILO Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (see also the examples given in the memorandum from the ILO to the ICJ in 1951, in ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, oral arguments, documents*, p. 232, or again article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change of 9 May 1992.

[228] See W. Paul Gormley, " The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and 'Other Alternatives': A Comparative Study of the ILO and Council of Europe", *Fordham Law Review*, 1970-1971, Part I, pp. 68 and 75, and Part II, p. 450.

[229] Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *I.C.L.Q.*, 1999, pp. 479-514, especially p. 505.

[230] Ibid.

(c) Statements made under optional clauses purport not to "exclude or to modify the legal effect of certain provisions of [a] treaty in their application" to their author[231] or to limit the obligations imposed on [the author] by the treaty,[232] but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect

(6) Here again, to a certain degree, the complex problems of "extensive reservations"[233] arise. However, draft guideline 1.4.1 adopted by the Commission in 1999 states that

> "A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice."

(7) The only difference between the statements envisaged in this draft guideline and those under consideration here is that the former are formulated on the sole initiative of the author, while the latter are made under a treaty

(8) Given the great differences between them, a confusion between reservations, on the one hand, and statements made under an optional clause, on the other, need hardly be feared, so that the Commission wondered whether it was necessary to include a guideline in the Guide to Practice in order to distinguish between them. A majority of its members considered the inclusion of such a distinction useful: even if statements based on optional clauses are obviously technically very different from reservations, with which statements made under exclusionary clauses may (and must) be equated, such statements are nevertheless the counterpart of statements made under exclusionary clauses and their general objective is too similar for them to be ignored, particularly since they are often presented jointly.[234]

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[231] See draft guideline 1.1.

[232] See draft guideline 1.1.5.

[233] See the commentaries to draft guidelines 1.1.5, 1.4.1 and 1.4.2 in *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221 and 270-274.

[234] Michel Virally includes them under the same heading, "optional clauses" ("Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'Homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, pp. 13-14).

(9) If the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,[235] there is nothing to prevent such a statement, in turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted. This is the case with the reservations frequently made by States when they accept jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute.[236]

(10) While no purpose would be served by deciding whether a distinction needs to be drawn between "reservations" and "conditions",[237] it is sufficient to state that:

> "There is a characteristic difference between these reservations and the type of reservation to multilateral treaties encountered in the law of treaties. ... Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State

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[235] In the *Loizidou v. Turkey* case, the European Court of Human Rights held that "having regard to the object and purpose of the [European] Convention [on Human Rights]", the consequences of restrictions on its competence "for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However, no such provision exists in either article 25 or article 46" (on these provisions, see above, note 226) (judgment of 23 March 1995, para. 75, R.U.D.H. 1995, p. 139).

[236] Although the Statute is silent on the possibility of optional declarations under Article 36, paragraph 2, being accompanied by reservations other than the condition of reciprocity, this power, which is well established in practice and was confirmed by committee IV/I of the San Francisco Conference (cf. UNCIO, vol. 13, p. 39), is quite clear. Cf. Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, vol. II. *Jurisdiction*, pp. 767-769; see also the dissenting opinion of Judge Bedjaoui attached to the judgement of the ICJ of 4 December 1998 in the *Fisheries Jurisdiction* case (Spain v. Canada), para. 42, and the judgment of 21 June 2000 in the *Aerial Incident of 10 August 1999* case (Pakistan v. India), paras. 37-38.

[237] Shabtai Rosenne makes a distinction between these two concepts (ibid., pp. 768-769).

unilaterally accepts the compulsory jurisdiction - to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage* (Merits) case."[238]

(11) These observations are consistent with the jurisprudence of the International Court of Justice and, in particular, its recent judgment of 4 December 1998 in the *Fisheries Jurisdiction* case between Spain and Canada:

> "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. (...) All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction are to be interpreted as a unity ..."[239]

(12) The same goes for the reservations which States attach to statements made under other optional clauses, such as those resulting from acceptance of the jurisdiction of the International Court of Justice under article 17 of the General Act of Arbitration, in respect of which the Court has stressed "the close and necessary link that always exists between a jurisdictional clause and reservations to it".[240]

(13) It is therefore impossible simply to equate reservations appearing in the unilateral statements by which a State or an international organization accepts a provision of a treaty under an optional clause with reservations to a multilateral treaty. It is undoubtedly true that their ultimate objective is to limit the legal effect of the provision which the author of the statement thereby recognizes as being applicable to it. However, the reservation in question cannot be separated from the statement and does not, in itself, constitute a unilateral statement.

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[238] Ibid., p. 769. The passage in question from the judgment relating to the *Right of Passage over Indian Territory* case of 12 April 1960 appears on page 34 of *I.C.J. Reports* 1960.

[239] Para. 44. See also para. 47: "Therefore, declarations and reservations are to be read as a whole".

[240] Judgment of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports*, 1978, p. 33, para. 79.

(14) In view of the great theoretical and practical importance[241] of the distinction, it seems necessary to supplement draft guideline 1.4.6 by specifying that the conditions and restrictions which accompany statements made under an optional clause do not constitute reservations within the meaning of the Guide to Practice any more than such statements themselves do.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty

> A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

Commentary

(1) Draft guideline 1.4.7 is part of a whole which also includes draft guidelines 1.1.8 and 1.4.6 and their common feature is that they relate to unilateral statements made under express provisions of a treaty enabling States to modify their obligations under the treaty, either by limiting those obligations on the basis of an exclusionary clause (draft guideline 1.1.8) or by accepting particular obligations under an optional clause (draft guideline 1.4.6). However, draft guideline 1.4.7 relates to the separate case in which the treaty requires States to choose between certain of its provisions, on the understanding, as shown by the examples given below, that the expression "two or more provisions of the treaty" is taken to cover not only articles and subparagraphs, but also chapters, sections and parts of a treaty, and even annexes forming an integral part of that treaty.

(2) This case is expressly dealt with in article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions. While paragraph 1 concerns the partial exclusion of the provisions of a treaty under an exclusionary clause, paragraph 2 relates to the intellectually different case in which the treaty contains a clause allowing a choice between several of its provisions.

> "The consent of a State [or an international organization] to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates."

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[241] Particularly as regards interpretation, cf. the aforementioned judgment of the ICJ of 4 December 1998 in the *Fisheries Jurisdiction* case, paras. 42-56.

(3) The commentary to this provision, reproduced without change by the Vienna Conference,[242] is concise, but sufficiently clear about the case covered:

> "Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers each State a choice between differing provisions of the treaty."[243]

(4) As has been noted,[244] however, it is not accurate (or, at all events, not very accurate) to say that such a practice is, today, not very common. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission in 1966, but this includes two different hypotheses which do not fully overlap.

(5) The first is illustrated, for example, by the statements made under the 1928 General Act for Conciliation, Judicial Settlement and Arbitration, article 38, paragraph 1, of which provides:

> "Accessions to the present General Act may extend:
>
> A. Either to all the provisions of the Act (chapters I, II, III and IV);
>
> B. Or to those provisions only which relate to conciliation and judicial settlement (chapters I and II), together with the general provisions dealing with these procedures (Chapter IV)."[245]

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[242] See *United Nations Conference on the Law of Treaties, first and second sessions (Vienna, 26 March-24 May 1968 and 9 April-2 May 1969)*, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), reports of the Committee of the Whole, paras. 156-157, pp. 129-130.

[243] *Yearbook ... 1966*, vol. II, p. 202, para. (3) of the commentary to article 14 (which became article 17 in 1969).

[244] Sia Spiliopoulo Åkermark, op. cit., p. 504.

[245] The revised General Act of 1949 adds a third possibility: "C. Or to those provisions only which relate to conciliation (Chapter I), together with the general provisions concerning that procedure (Chapter IV)."

The same is true of several ILO conventions, in which this technique, often used subsequently,[246] was introduced by Convention No. 102 of 1952 concerning Minimum Standards of Social Security, article 2 of which provides:

> "Each Member for which this Convention is in force -
>
> (a) shall comply with -
>
> (i) Part I,
>
> (ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X,
>
> (iii) the relevant provisions of Parts XI, XII and XIII; and
>
> (iv) Part XIV"

Along the same lines, mention may be made of the European Social Charter, of 18 October 1961, article 20, paragraph 1, of which provides for a partially optional system of acceptance:[247]

> "Each of the Contracting Parties undertakes:
>
> (a) To consider part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part;
>
> (b) To consider itself bound by at least five of the following articles of part II of this Charter: articles 1, 5, 6, 12, 13, 16 and 19;
>
> (c) [ ] to consider itself bound by such a number of articles or numbered paragraphs of part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs".[248]

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[246] See P.H. Imbert, op. cit., p. 172.

[247] Hans Wiebringhaus, "*La Charte sociale européenne: vingt ans après la conclusion du Traité*, *A.F.D.I.*, 1982, p. 936.

[248] This complex system was used again in article A, paragraph 1, of the revised Social Charter on 3 May 1996. See also articles 2 and 3 of the 1964 European Code of Social Security and article 2 of the European Charter for Regional or Minority Languages of 5 November 1992: "1. Each Party undertakes to apply the provisions of part II to all the regional or minority languages spoken within its territory and which comply with the definition in article 1. 2. In respect of each language specified at the time of ratification, acceptance or approval, in accordance with article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or subparagraphs chosen from among the provisions of part III of the Charter, including at least three chosen from each of the articles 8 and 12 and one from each of the articles 9, 10, 11 and 13."

(6) Such provisions should not be equated with the optional clauses referred to in draft guideline 1.4.6, from which they are clearly very different: the statements which they invite the parties to formulate are not optional, but binding, and condition the entry into force of the treaty for them[249] and they have to be made at the time of giving consent to be bound by the treaty.

(7) Similarly, these statements cannot be completely equated with those made in application of an exclusionary clause.[250] Clearly, they end up by excluding the application of provisions which do not appear in them. They do so indirectly, however, through partial acceptance,[251] and not by excluding the legal effect of those provisions, but because of the silence of the author of the statement in respect of them.

(8) The same is true of statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) or, *alternatively*, another provision (or another set of provisions). This is no longer a question of choosing *among* the provisions of a treaty, but of choosing *between them*, on the understanding that, in contrast to the previous case, there can be no accumulation,[252] and the acceptance of a treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

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[249] This may be seen from the rest of the wording of article 17, para. 2, cited above (para. (2)) of the Vienna Conventions.

[250] See draft guideline 1.1.8.

[251] P.H. Imbert, op. cit., p. 170.

[252] Article 287 of the 1982 United Nations Convention on the Law of the Sea is midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure provided for in annex VII applies. But there may be an accumulation of different procedures.

(9) These "alternative clauses" are less common than those analysed above They do exist, however, as demonstrated by, for example, article 2 of ILO Convention No 96 (revised) of 1949 concerning Fee-Charging Employment Agencies [253]

> "1 Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit
>
> 2 Any Member accepting the provisions of part III of the Convention may subsequently notify the Director General that it accepts the provisions of part II; as from the date of the registration of such notification by the Director General, the provisions of part III of the Convention shall cease to be applicable to the Members in question and the provisions of part II shall apply to it" [254]

(10) As has been observed, "[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations" [255] Moreover, the silence of article 17, paragraph 2, of the Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19 to 23 on reservations,[256] constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments

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[253] Pierre-Henri Imbert stresses that this is the best example of the type of clause allowing States to make a choice in the restrictive sense (op cit , p 172); see also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Swedish Institute of International Law, Studies in International Law, No 5, T M C Asser Instituut, The Hague, 1988, p 134

[254] See also section 1 of article XIV of the IMF Statutes (amended in 1976), whereby "Each member shall notify the Fund whether it intends to avail itself of the transitional arrangements in section 2 of this article [Exchange restrictions], or whether it is prepared to accept the obligations of article VIII, sections 2, 3 and 4 [General obligations of member States] A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept these obligations"

[255] F Horn, ibid , p 133

[256] Cf paras (13) to (15) of the commentary to draft guideline 1 1 8

(11) In the two forms which they may take, these statements are clearly alternatives to reservations in that they constitute procedures which modify the application of a treaty on the basis of the preferences of the parties (even if these preferences are strongly indicated in the treaty). In addition, like reservations, they take the form of unilateral statements made at the time of signature or of the expression of consent to be bound (even if they may subsequently be modified, but, under certain conditions, reservations may be modified, too). And the fact that they have to be provided for in the treaty to which they apply does not constitute a factor differentiating them from reservations, since reservations may also be provided for in a restrictive way by a reservation clause.

(12) There are striking differences between these statements and reservations, however, because, unlike reservations, these statements are the condition *sine qua non*[257] of the participation of the author of the statement in the treaty. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, this exclusion relates to the treaty itself and is inseparable from the entry into force of other provisions of the treaty in respect of the author of the same statement.

1.7 Alternatives to reservations and interpretative declarations

Commentary

(1) Reservations are not the only procedure enabling the parties to a treaty to exclude or modify the legal effect of certain provisions of the treaty or of certain particular aspects of the treaty as a whole. Accordingly, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, designed to enable and do indeed enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations and recourse to such procedures may probably make it possible, in specific cases, to overcome some problems linked to reservations. In the Commission's view, these procedures, far from constituting invitations to States to make a treaty less effective, as some members seemed to fear, would instead help to make recourse to reservations less "necessary" or frequent by offering more flexible treaty techniques.

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[257] This is the reason why draft guideline 1.4.7 states that a treaty must expressly require the parties to choose between two or more provisions of the treaty; if the choice is optional, an exclusionary clause within the meaning of draft guideline 1.1.8 is what is involved.

(2) Moreover, some members of the Commission considered that certain of these alternatives differed profoundly from reservations in that they constituted, not unilateral statements, but clauses in the treaty itself, and that, accordingly, they related more to the process of drafting a treaty than to its application. It seemed clear, however, that, as they produce effects almost identical to those produced by reservations, these techniques deserve to be mentioned in the chapter of the Guide to Practice devoted to the definition of reservations, if only so as to identify more clearly the key elements of the concept, distinguish them from reservations and, where applicable, draw appropriate conclusions with regard to the legal regime of reservations.

(3) The same problem arises, *mutatis mutandis*, with regard to interpretative declarations whose objective may be achieved by other means.

(4) Some of these alternative procedures are the subject of draft guidelines in section 1.4 of the Guide to Practice. However, these deal only with "unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations",[258] excluding other techniques for modifying the provisions of a treaty or their interpretation. Given the practical nature of the Guide it has undertaken to draft, the Commission considered that it might be useful to devote a short section of the instrument to the range of procedures constituting alternatives to reservations and interpretative declarations, to serve as a reminder to users and, in particular, to the negotiators of treaties of the wide range of possibilities available to them for that purpose.

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- the insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

Commentary

(1) The formulation of reservations constitutes a means for States (and to some extent, for international organizations) partially to preserve their freedom of action while accepting in principle to limit that freedom by becoming bound by a treaty. This "concern of each

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[258] Cf. draft guideline 1.4.

Government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)"[259] is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations[260] or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules.

(2) It is this type of consideration which led the authors of the Constitution of the International Labour Organization (ILO) to state in article 19, paragraph 3:

> "In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries."[261]

According to the ILO, which bases its refusal to permit reservations to the international labour conventions on this article:[262]

> "This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference's judgement."[263]

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[259] Guy de Lacharrière, *La politique juridique extérieure*, Économica, Paris, 1983, p. 31.

[260] Such is the case, for example, of the charters of "integrating" international organizations (cf. the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

[261] This provision reproduces the provisions of article 405 of the Treaty of Versailles.

[262] See the commentary to draft guideline 1.1.8, paragraph 3.

[263] "Admissibility of reservations to general conventions", memorandum by the Director of the International Labour Office submitted to the Council on 15 June 1927, League of Nations, *Official Journal*, July 1927, p. 883. See also "Written Statement of the International Labour Organization", in ICJ, *Pleadings, Oral Arguments, Documents - Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 224 and 236.

As in the case of reservations, but by a different procedure, the aim is:

> "to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of States to become parties, though they are unable to assume full obligations."[264]

(3) The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures that are the subject of draft guideline 1.7.1. Reservations are one of the means intended to bring about this reconciliation. But they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"[265] without undermining its purpose and object. Many other procedures are used to give treaties the flexibility necessitated by the diversity of situations of the States or international organizations seeking to be bound,[266] it being understood that the word "may" in the text of draft guideline 1.7.1 must not be interpreted as implying any value judgement as to the use of one or the other technique, but must be understood as being purely descriptive.

(4) The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport "to exclude or to modify the legal effect of certain provisions of the treaty"[267] or "of the treaty as a whole with respect to certain specific aspects"[268] in their

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[264] W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, 1970-1971, p. 65. On the strength of these similarities, this author, at the cost of worrisome terminological confusion, encompasses in a single study "all devices the application of which permit a State to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text", ibid., p. 64.

[265] Jean Combacau and Serge Sur, *Droit international public*, Montchrestien, Paris, 1999, p. 133.

[266] Some authors have endeavoured to reduce all these procedures to one: see, *inter alia*, Georges Droz, who contrasts "reservations" and "options" ("Les réserves et les facultés dans les Conventions de La Haye de droit international privé", *R.C.D.I.P.* 1969, p. 383). On the other hand, Ferenc Majoros believes that "the set of 'options' is merely an amorphous group of provisions *which afford various options*" ("Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *J.D.I.*, 1974, p. 88 (italics in original).

[267] See draft guideline 1.1.

[268] See draft guideline 1.1.1.

application to certain parties. But there the similarities end and drawing up a list of them proves difficult, "for the imagination of legal scholars and diplomats in this area has proved to be unlimited".[269] In addition, on the one hand, some treaties combine several of these procedures with each other and with reservations and, on the other hand, it is not always easy to differentiate them clearly from one another.[270]

(5) There are many ways of grouping them, by techniques used (treaty or unilateral), by the object pursued (extension or restriction of obligations under the treaty) or by the reciprocal or non-reciprocal nature of their effects. They may also be distinguished according to whether the modification of the legal effects of the provisions of a treaty is provided for in the treaty itself or results from exogenous elements.

(6) In the first of these two categories, mention can be made of the following:

- Restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"[271] in respect of the area covered by the obligation or its period of validity;

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[269] Michel Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, p. 6.

[270] Ibid., p. 17.

[271] Ibid., p. 10. This notion corresponds to "clawback clauses" as they have been defined by Rosalyn Higgins: "By a 'clawback' clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons" ("Derogations under Human Rights Treaties", *B.Y.B.I.L.*, 1976-1977, p. 281; see also Fatsah Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général", *R.G.D.I.P.* 1994, p. 296). Other authors propose a more restrictive definition; according to R. Gitleman, clawback clauses are provisions "that entitle a State to restrict the granted rights to the extent permitted by domestic law" ("The African Charter on Human and Peoples' Rights", *Virg. J. Int. L. 1982*, p. 691, cited by Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles - Etude sur l'article 15 de la Convention européenne des droits de l'homme*, Bruylant, Brussels, 1987, p. 25).

- Escape clauses, "which have as their purpose to suspend the application of general obligations in specific cases",[272] and among which mention can be made of saving and derogations clauses,[273]
- Opting-[or contracting-]in clauses, which have been defined as "those to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole",[274]
- Opting-[or contracting-]out clauses, "under which a State will be bound by rules adopted by majority vote even if it does not express its intent not to be bound within a certain period of time",[275] or

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[272] M. Virally, ibid., p. 12.

[273] Escape clauses permit a Contracting Party temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other Contracting Parties or by an organ responsible for monitoring treaty implementation. A comparison of article XIX, paragraph 1, and article XXV, paragraph 5, of the 1947 General Agreement on Tariffs and Trade shows the difference clearly. The first article reads: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a Contracting Party under this Agreement, including tariff concessions, any product is being imported into the territory of that Contracting Party in such increased quantities and under such conditions as to threaten serious injury to domestic producers in that territory of like products, the Contracting Party shall be free, in respect of such products, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession". This is an escape clause (this option has been regulated but not abolished by the 1994 GATT Agreement on Safeguards (Marrakesh, 15 April 1994)). On the other hand, the general provision laid down in article XXV, paragraph 5 (entitled "Joint Action by the Contracting Parties"), is a waiver: "In exceptional circumstance not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a Contracting Party by this Agreement, provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the Contracting Parties" (see also article VIII, section 2 (a), of the IMF Agreement).

[274] Michel Virally, op. cit., p. 13.

[275] Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours de l'Académie de droit international*, 1994-VI, vol. 250, p. 329; see also Christian Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des cours de l'Académie de droit international*, 1993, vol. 241, pp. 264 et seq.

- Those which offer the parties a choice among several provisions; or again,
- Reservation clauses, which enable the contracting parties to formulate reservations, subject to certain conditions and restrictions, as appropriate.

(7) In the second category,[276] which includes all procedures that, although not expressly envisaged therein, enable the parties to modify the effect of the provisions of the treaty, are the following:

- Reservations again, where their formulation is not provided for or regulated by the instrument to which they apply;
- Suspension of the treaty,[277] whose causes are enumerated and codified in part V of the Vienna Conventions of 1969 and 1986, particularly the application of the principles *rebus sic stantibus*[278] and *non adimpleti contractus*;[279]
- Amendments to the treaty, where they do not automatically bind all the parties thereto;[280] or
- Protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,[281] including in the framework of "bilateralization".[282]

(8) This list by no means claims to be exhaustive: as emphasized above,[283] negotiators display seemingly limitless ingenuity which precludes any pretensions to exhaustiveness.

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[276] Among the latter modification techniques, the first two are unilateral, but derive from the general international law of treaties, while the last two derive from the joint initiative of the parties to the treaty, or some of them, following its adoption.

[277] Termination of the treaty is a different matter; it puts an end to the treaty relations.

[278] Cf. article 62 of the Vienna Conventions.

[279] Cf. article 60 of the Vienna Conventions.

[280] Cf. article 40, paragraph 4, and article 30, paragraph 4, of the Vienna Conventions.

[281] Cf. article 41 of the Vienna Conventions.

[282] See paras. (19)-(23) of the commentary.

[283] See para. (4) of the commentary.

Consequently, draft guideline 1 7 1 is restricted to mentioning two procedures which are not mentioned elsewhere and are sometimes characterized as "reservation", although they do not by any means meet the definition contained in draft guideline 1 1

(9) Other "alternatives to reservations", which take the form of unilateral statements made in accordance with a treaty, are the subject of draft guidelines appearing in section 1 4 of the Guide to Practice This applies to statements made under

- an optional clause, sometimes accompanied by conditions or restrictions (draft guideline 1 4 6), or
- a clause providing for a choice between several provisions or groups of provisions (draft guideline 1 4 7)

(10) There are other alternative procedures which so obviously do not belong in the category of reservations that it does not seem useful to mention them specifically in the Guide to Practice This is true, for example, of notifications of the suspension of a treaty These too are unilateral statements, as reservations are, and, like reservations, they may purport to exclude the legal effects of certain provisions of the treaty, if separable,[284] in their application to the author of the notification, but only on a temporary basis Governed by article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions,[285] their purpose is to release the parties "between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations

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[284] Cf article 57 (a) (Suspension of a treaty under its provisions) and article 44 of the two Conventions on "separability of treaty provisions" See Paul Reuter, "Solidarite et divisibilite des engagements conventionnels" in Y Dinstein, ed , *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne*, Nijhoff, Dordrecht, 1989, pp 623-634, also reproduced in Paul Reuter, *Le developpement de l'ordre juridique international-Ecrits de droit international*, Economica, Paris, 1995, pp 361-374

[285] "A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation must notify the other parties of its claim The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor "

during the period of the suspension"[286] and they are clearly different from reservations, not so much by the temporary nature of the exclusion of the operation of the treaty[287] as by the timing of their occurrence, which is necessarily subsequent to the entry into force of the treaty in respect of the author of the statement Furthermore, the Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime [288]

(11) The same applies when the suspension of the effect of the provisions of a treaty is the result of a notification made not, as in the case referred to above, under the rules of the general international law of treaties, but on the basis of specific provisions in the treaty itself [289] The identical approach taken when applying this method and that of reservations is noteworthy "Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties Similarly, the fact that it is possible to release oneself or be released for a given period of time from one's international obligations is such as to encourage a hesitant State to enter finally into a

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[286] Article 72 of the Vienna Conventions

[287] Certain reservations can be made only for a specific period, thus, Frank Horn offers the example of ratification by the United States of the 1933 Montevideo Convention on Extradition, with the reservation that certain provisions thereof should not be applicable to the United States " until subsequently ratified in accordance with the Constitution of the United States" (*Reservations and Interpretative Declarations to Multilateral Treaties*, Swedish Institute of International Law, Studies in International Law, No 5, Tobias Michael Carel Asser Instituut, The Hague, 1988, p 100) And certain reservation clauses even impose such a provisional nature (cf article 25, paragraph 1, of the 1967 European Convention on the adoption of children and article 14, paragraph 2, of the 1975 European Convention on the legal status of children born out of wedlock, whose wording is identical "A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period", or article 20 of The Hague Divorce Convention of 1 June 1970, which authorizes Contracting States which do not provide for divorce to reserve the right not to recognize a divorce, but whose paragraph 2 states "This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce")

[288] Cf, in particular, articles 65, 67, 68 and 72

[289] As indicated above (note 273), such exclusionary clauses fall into two categories waivers and escape clauses

commitment that offers it a number of advantages. There, however, the similarity between the two procedures ends".[290] In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas, in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty.[291] Since there is no likelihood of serious confusion between such notifications and reservations, it is not essential to include a draft guideline relating to the former in the Guide to Practice.

(12) The situation is different with regard to two other procedures which may also be considered alternatives to reservations, in the sense that they purport (or may purport) to modify the effects of a treaty in respect of specific features of the situation of the parties: restrictive clauses and agreements whereby two or more States or international organizations purport, under a specific provision of a treaty, to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

(13) It would seem that everything but their purpose differentiates these procedures from reservations. They are purely conventional techniques which take the form not of unilateral statements, but of one or more agreements between the parties to a treaty or between some of them. Where restrictive clauses in the treaty, amendments that enter into force only for certain parties to the treaty or "bilateralization" procedures are concerned, however, problems may arise if only because certain legal positions have been adopted which, in a most questionable manner, characterize such procedures as "reservations". This is why the majority of the members of the Commission considered it useful to refer to them explicitly in draft guideline 1.7.1.

(14) There are countless restrictive clauses purporting to limit the purpose of obligations resulting from the treaty by introducing exceptions and limits and they are to be found in treaties on a wide range of subjects, such as the settlement of disputes,[292] the safeguarding of human

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[290] Aleth Manin, "A propos des clauses de sauvegarde", *Revue trimestrielle de droit européen*, 1970, p. 3.

[291] See paragraph (10) above. See also, in that connection, Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *International and Comparative Law Quarterly*, 1999, pp. 501-502.

[292] In addition to article 27 of the above-mentioned 1957 European Convention, see, for example, article 1 of the Franco-British Arbitration Agreement of 14 October 1903, which has served as a model for a great number of subsequent treaties: "Differences which may arise of a

rights,[293] protection of the environment,[294] trade[295] and the law of armed conflicts [296] Although such provisions are similar to reservations in their object,[297] the two procedures operate differently in the case of restrictive clauses, there is a general exclusion arising out of the treaty

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Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of 29 July 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties "

[293] Cf the "clawback clauses" referred to above in note 14 For example (again, there are innumerable examples), article 4 of the 1966 Covenant on Economic, Social and Cultural Rights "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society "

[294] Cf article VII ("Exemptions and other special provisions relating to trade") of the Convention of 3 March 1973 on International Trade in Endangered Species of Wild Fauna and Flora, or article 4 (Exceptions) of the Lugano Convention of 21 June 1993 on Civil Liability for Damage Resulting from Activities Dangerous to the Environment

[295] Cf article XII ("Restrictions to safeguard the balance of payments"), article XIV ("Exceptions to the rule of non-discrimination"), article XX ("General exceptions") or article XXI ("Security exceptions") of the 1947 General Agreement on Tariffs and Trade

[296] Cf article 5 of the Geneva Conventions of 12 August 1949 ("Derogations")

[297] Prof Pierre-Henri Imbert gives two examples that highlight this fundamental difference, by comparing article 39 of the revised General Act of Arbitration of 28 April 1949 with article 27 of the European Convention of 29 April 1957 for the peaceful settlement of disputes (*Les réserves aux traités multilatéraux, Pedone*, Paris, 1979, p 10), under article 39, paragraph 2, of the General Act, reservations that are exhaustively enumerated and "must be indicated at the time of accession may be such as to exclude from the procedure described in the present act (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute, (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States" Meanwhile, article 27 of the 1957 Convention reads "The provisions of this Convention shall not apply to (a) Disputes relating to facts or situations prior to the entry into force of this Convention as between the Parties to the dispute, (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States " Article 39 of the 1949 General Act of Arbitration is a reservation clause, article 27 of the 1957 Convention is a restrictive clause There are striking similarities in both cases, the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question

itself, in the case of reservations, it is merely a possibility available to the States parties, permitted under the treaty, but becoming effective only if a unilateral statement is made at the time of accession.[298]

(15) At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and are "such terms as 'public order reservations', 'military imperatives reservations', or 'sole competence reservations' frequently encountered",[299] but authors, including the most distinguished among them, have caused an unwarranted degree of confusion. For example, in an often quoted passage[300] from the dissenting opinion that he appended to the Judgment of the International Court of Justice rendered on 1 July 1952 in the *Ambatielos (Preliminary objection)* case, Judge Zoričic stated the following:

> "A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning."[301]

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[298] In the preceding example, therefore, it is not entirely accurate to assert, as P.H. Imbert does, that "in practice, article 27 of the European Convention produces the same result as a reservation in respect of the General Act" (ibid., p. 10). This is true only of the reserving State's relations with other parties to the General Act and not of such other parties' relations among themselves, to which the treaty applies in its entirety.

[299] Pierre-Henri Imbert, ibid., p. 10. For an example of a "public order reservation", see the first paragraph of article 6 of the Havana Convention of 20 February 1928 regarding the Status of Aliens in the respective Territories of the Contracting Parties: "For reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory." For an example of a "sole competence reservation", see article 3, paragraph 11, of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: "Nothing contained in this article [on 'offences and sanctions'] shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a party and that such offences shall be prosecuted and punished in conformity with that law."

[300] Cf. Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" in *The British Year Book of International Law 1957*, pp. 272-273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

[301] *I.C.J. Reports*, 1952, p. 76. For another example, see Georges Scelle, *Précis de droits des gens (Principes et systématiques)*, Sirey, Paris, vol. 2, 1934, p. 472.

(16) Draft guideline 1.7.1 refers to restrictive clauses both as a warning against this frequent confusion and as an indication that they are a possible alternative to reservations within the meaning of the Guide to Practice.

(17) The reference to agreements, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves is made for the same reasons.

(18) It would not appear to be necessary to dwell on another treaty procedure that would make for flexibility in the application of a treaty - amendments (and additional protocols) that enter into effect only as between certain parties to a treaty,[302] but it does seem necessary to consider certain specific agreements which are concluded between two or more States parties to basic treaties, which purport to produce the same effects as reservations and in connection with which reference has been made to the "bilateralization" of "reservations".

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[302] This procedure, which is provided for in article 40, paragraphs 4 and 5 (and article 30, paragraph 4), and article 41 of the 1969 and 1986 Vienna Conventions, is applied as a matter of routine. Even if, in terms of its general approach and as regards some aspects of its legal regime (respect for the fundamental characteristics of the treaty, though it does not contain a reference to its "object and purpose"), it is similar to procedures that characterize reservations, it is nonetheless very different in many respects:

> The flexibility it achieves is not the product of a unilateral statement by a State, but of agreement between two or more parties to the initial treaty;
>
> Such agreement may be reached at any stage, generally following the treaty's entry into effect for its parties, which is not so in the case of reservations that must be formulated at the time of the expression of consent to be bound, at the latest; and
>
> It is not a question here of excluding or modifying *the legal effect* of certain provisions of the treaty *in their application*, but in fact of modifying *the provisions in question themselves*.
>
> Moreover, whereas reservations can only limit their author's treaty obligations or make provision for equivalent ways of implementing a treaty, amendments and protocols can have the effect of both extending and limiting the obligations of States and international organizations parties to a treaty.

Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to devote a specific guideline in the Guide to Practice to drawing a distinction which is already quite clear.

(19) The bilateralization regime has been described as permitting "contracting States, while being parties to a multilateral convention, to choose the partners with which they will proceed to implement the regime provided for".[303] It can be traced back to article XXXV, paragraph 1, of the 1947 General Agreement on Tariffs and Trade.[304] The general approach involved in this procedure is not comparable with the approach on which the reservations method is based; it allows a State to exclude, by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with

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[303] M. H. Van Hoogstraten, "*L'état présent de la Conférence de La Haye de Droit International Privé*", in *The Present State of International Law and other essays written in honour of Centenary Celebration of the International Law Association 1873-1973*, Kluwer, 1973, The Netherlands p. 387.

[304] "This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application". See Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 199. The practice of "lateral agreements" (cf. Dominique Carreau and Patrick Juillard, *Droit international économique*, Paris, Libraire générale de droit et de jurisprudence, 1998, pp. 54-56 and 127) has accentuated this bilateralization. See also article XIII of the Agreement Establishing the World Trade Organization or certain conventions adopted at The Hague Conference on Private International Law: for example, article 13, paragraph 4, of the Companies Convention of 1 June 1956, article 12 of the Legalization Convention of 5 October 1961, article 31 of the Maintenance-enforcement Convention of 2 October 1973, article 42 of the Administration of Estates Convention of 2 October 1973, article 44, paragraph 3, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, article 58, paragraph 3, of The Hague Convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures for the protection of children, article 54, paragraph 3, of the Convention of 2 October 1999 on the international protection of adults or article 37 of the European Convention of 16 May 1972 on State Immunity, adopted in the context of the Council of Europe: "3. ... if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States".

respect to certain aspects. It is more comparable with statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.[305]

(20) However, the same is not true when bilateralization involves an agreement to derogate from a treaty concluded among certain parties in application of treaty provisions expressly authorizing this, as can be seen in the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, adopted on 1 February 1971 within the framework of The Hague Conference on Private International Law. It was, in fact, during the elaboration of this Convention that the doctrine of "bilateralization of reservations" was elaborated.

(21) However, in response to a Belgian proposal, the 1971 Enforcement Convention goes further than these traditional bilateralization methods. Not only does article 21 of this instrument make the Convention's entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,[306] but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23.[307]

> "In the Supplementary Agreements referred to in article 21 the Contracting States may agree ..."

This is followed by a list of 23 possible ways of modifying the Convention, whose purposes, as summarized in the explanatory report of C. N. Fragistas, are:

> "1. *To clarify a number of technical expressions used by the Convention* whose meaning may vary from one country to another (art. 23 of the Convention, items No. 1, 2, 6 and 12),

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[305] Cf. draft guideline 1.4.3 and paras. (5)-(9) of the commentary (International Law Commission, Report on the work of its fifty-first session, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 277-279).

[306] "Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect."

[307] The initial Belgian proposal did not envisage this modification possibility, which was established subsequently as the discussions progressed (Cf. P. Jenard, "Une technique originale: La bilatéralisation de conventions multilatérales", *Belgian Review of International Law* 1966, pp. 392-393).

2. *To include within the scope of the Convention matters that do not fall within its scope* (art. 23 of the Convention, items Nos. 3, 4 and 22),

3. *To apply the Convention in cases where its normal requirements have not been met* (art. 23 of the Convention, items Nos. 7, 8, 9, 10, 11, 12 and 13),

4. *To exclude the application of the Convention in respect of matters normally covered by it* (art. 23 of the Convention, item No. 5),

5. *To declare a number of provisions inapplicable* (art. 23 of the Convention, item No. 20),

6. *To make a number of optional provisions of the Convention mandatory* (art. 23 of the Convention, items Nos. 8 *bis* and 20),

7. *To regulate issues not settled by the Convention or adapt a number of formalities required by it to domestic legislation* (art. 23 of the Convention, items Nos. 14, 15, 16, 17, 18 and 19)".[308]

Undoubtedly, many of these alternatives "simply permit States to define words or to make provision for procedures",[309] however, a number of them restrict the effect of the Convention and have effects very comparable to those of reservations, which they nevertheless are not.[310]

(22) The 1971 Enforcement Convention is not the only treaty that makes use of this procedure of pairing a basic convention and a supplementary agreement, thus permitting the introduction to the convention of alternative contents, even though the convention is a typical example and probably a more refined product. Reference may also be made, *inter alia*, to:[311]

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[308] Conférence de la Haye, *Actes et documents de la session extraordinaire*, 1966, p. 364 - emphasis in the original text. Also see Georges A.L. Droz, "Le récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale", *Netherlands International Law Review* 1966, p. 240.

[309] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 200.

[310] *Contra* P.H. Imbert, ibid.

[311] These examples have been borrowed from Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 201.

Article 20 of The Hague Convention of 15 November 1965 on the service of judicial documents, which permits contracting States to "agree to dispense with" a number of provisions,[312]

Article 34 of the Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods,[313]

Articles 26, 56 and 58 of the European Convention of 14 December 1972 on social security, which with similar wording states:

> "The application [of certain provisions] as between two or more Contracting Parties shall be subject to the conclusion between those Parties of bilateral or multilateral agreements which may also contain appropriate special arrangements",

or, for more recent examples:

Article 39, paragraph 2, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption:

> "Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention",[314]

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[312] But the application of this provision does not depend on the free choice of partner, see P.H. Imbert, ibid., also see Georges A.L. Droz, "Les réserves et les facultés dans les Conventions de La Haye de droit international privé", *Revue critique de droit international privé* 1969, pp. 390-391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

[313] The same remark applies to this provision.

[314] Once again, one cannot truly speak of bilateralization in a strict sense since this provision does not call for the choice of a partner. Also see article 52 of the draft Hague convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures relating to protection of children, or article 49 of The Hague Convention of 2 October 1999 on international protection of adults.

or article 5 (Voluntary extension) of the Helsinki Convention of 17 March 1992 on the Transboundary Effects of Industrial Accidents:

> "Parties concerned should, at the initiative of any of them, enter into discussions on whether to treat an activity not covered by Annex I as a hazardous activity. Where the parties concerned so agree, this Convention, or any part thereof, shall apply to the activity in question as if it were a hazardous activity."

(23) These options, which permit parties concluding a supplementary agreement to exclude the application of certain provisions of the basic treaty or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the two parties bound by the agreement. However, and this is a fundamental difference from reservations strictly speaking, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,[315] but, rather, an agreement between two of the parties to the basic treaty that does not affect the other contracting parties to the treaty. "The system leads to the elaboration of two instruments: a multilateral convention, on the one hand, and a supplementary agreement, on the other, which, although based on the multilateral convention, nevertheless has an independent existence".[316] The supplementary agreement is, so to speak, an instrument that is not a prerequisite for the entry into force of the treaty, but for ensuring that the treaty has effects on relations between the two parties concluding the agreement, since its effects will otherwise be diminished (and it is in this respect that its similarity to the reservations procedure is particularly obvious) or increased. However, its treaty nature precludes any equation with reservations.

(24) It is such agreements, which have the same object as reservations and which are described, frequently, but misleadingly, as "bilateralized reservations", that are the subject of the second subparagraph of draft guideline 1.7.1.

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[315] Cf. draft guideline 1.1: "'Reservation' means *a unilateral statement* ..."

[316] P. Jenard, Rapport du Comité restreint sur la bilatéralisation, Conférence de La Haye, *Actes et documents de la session extraordinaire*, 1966, p. 145. Also see the explanatory report by C.N. Fragistas, ibid., pp. 363-364, or Georges A.L. Droz, "Les réserves et les facultés dans les Conventions de La Haye de droit international privé", *Revue critique de droit international privé* 1969, p. 391.

1.7.2 [1.7.5] Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

Commentary

(1) Just as reservations are not the only means at the disposal of contracting parties for modifying the application of the provisions of a treaty, interpretative declarations are not the only procedure by which States and international organizations can specify or clarify their meaning or scope. Leaving aside the third-party interpretation mechanisms provided for in the treaty,[317] the variety of such alternative procedures in the area of interpretation is nonetheless not as great. As an indication two procedures of this type can be mentioned.

(2) In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.[318] Moreover, it is very common for a treaty to provide instructions on how to interpret the obligations imposed on the parties either in the body of the treaty itself[319] or in a separate instrument.[320]

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[317] Cf. Denys Simon, *L'interprétation judiciaire des traités d'organisations internationales*, Paris, Pedone, 1981, p. 936.

[318] Cf., among countless examples, article 2 of the Vienna Conventions of 1969 and 1986 or article XXX of the Statutes of the International Monetary Fund.

[319] Cf., here again, among countless examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights: "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, ..."

[320] Cf. "Notes and supplementary provisions" to the GATT of 1947. This corresponds to the possibility envisaged in article 30, paragraph 2, of the Vienna Conventions of 1969 and 1986.

(3) Second, the parties, or some of them,[321] may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the Vienna Conventions of 1969 and 1986, which requires to take into account, together with the context:

> "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".[322]

(4) Moreover, it may happen that the interpretation is "bilateralized".[323] Such is the case where a multilateral convention relegates to bilateral agreements the task of clarifying the meaning or scope of certain provisions. Thus, article 23 of the Hague Conference Convention of 1971 on the recognition and enforcement of foreign judgements in civil and commercial matters provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

> "1. To clarify the meaning of the expression 'civil and commercial matters', to determine the courts whose decisions shall be recognized and enforced under this Convention, to define the expression 'social security' and to define the expression 'habitual residence';
>
> 2. To clarify the meaning of the term 'law' in States with more than one legal system; ...".[324]

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[321] Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see the final commentary of the International Law Commission on article 27, para. 3 (a), of the draft articles on the law of treaties, which became article 30, para. 3 (a), of the Vienna Convention of 1969: *Yearbook ... 1966*, vol. II, p. 241, para. 14); cf., with regard to bilateral treaties, draft guideline 1.5.3.

[322] One member of the Commission nevertheless expressed doubt about whether such an agreement should be equated with those dealt with in article 31.

[323] On the "bilateralization" of reservations, see draft guideline 1.7.4 and paragraphs (18) to (23) of the commentary.

[324] On this provision, see paragraph (20) of the commentary to draft guideline 1.7.1.

(5) It therefore seems desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with draft guideline 1.7.1 on alternatives to reservations. On the other hand, it does not appear necessary to devote a separate draft guideline to the enumeration of alternatives to conditional interpretative declarations:[325] the alternative procedures listed above are treaty-based and require the agreement of the contracting parties. It matters little, therefore, whether or not the agreed interpretation constitutes the sine qua non of their consent to be bound.

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[325] See draft guideline 1.2.1.

CHAPTER VIII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

A. Introduction

664. At its forty-ninth session, in 1997, the Commission decided to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[326] The General Assembly took note of this decision in paragraph 7 of its resolution 52/156.

665. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[327]

666. At its fiftieth session, the Commission had before it the Special Rapporteur's first report (A/CN.4/487 and Add.1). The report reviewed the Commission's work on the topic of liability since it was first placed on the agenda in 1978, focusing in particular on the question of the scope of the draft articles to be elaborated. This was followed by an analysis of the procedural and substantive obligations which the general duty of prevention entailed. Having agreed on the general orientation of the topic, the Commission established a Working Group to review the draft articles recommended by the Working Group in 1996 in the light of the Commission's decision to focus first on the question of prevention.[328]

667. At its 2542nd meeting, on 5 June 1998, the Commission referred to the Drafting Committee the draft articles proposed by the Special Rapporteur on the basis of the discussions held in the Working Group.

668. The Commission considered the report of the Drafting Committee at its 2560th to 2563rd meetings, on 12 and 13 August 1998 and adopted on first reading a set of 17 draft articles on prevention of transboundary damage from hazardous activities.

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[326] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 168.

[327] Ibid.

[328] On the basis of the Working Group's discussions, the Special Rapporteur proposed a revised text for the draft articles (A/CN.4/L.556).

669. At its 2531st meeting, on 15 May 1998, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2000.

670. At its fifty-first session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/501), which dealt with, *inter alia*, the nature of the obligation of prevention; the eventual form of the draft articles, dispute settlement procedures; the salient features of the concept of due diligence and its implementation; the treatment of the concept of international liability in the Commission since the topic was placed on its agenda as well as negotiations on liability issues in other international fora; and the future course of action on the question of liability.

671. At its 2600th and 2601st meetings, on 9 and 13 July 1999, the Commission considered the second report of the Special Rapporteur and decided to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.

B. Consideration of the topic at the present session

672. At the present session, the Commission had before it the Report of the Secretary-General containing the comments and observations received from Governments on the topic.[329]

673. At its 2612th meeting, on 1 May 2000, the Commission decided to establish a Working Group on the topic. The Working Group held five meetings from 8 to 15 May. The Commission considered the oral report of the Chairman of the Working Group at its 2628th meeting on 26 May.

674. The Commission also had before it the third report by the Special Rapporteur.[330] The Commission considered the report at its 2641st to 2643rd meetings from 18 to 20 July 2000.

1. Introduction by the Special Rapporteur of his third report

675. In his introduction of the draft articles[331] on prevention of transboundary damage from hazardous activities, the Special Rapporteur noted that they essentially constituted progressive

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[329] A/CN.4/509.

[330] A/CN.4/510.

[331] The draft preamble and revised draft articles 1 to 19, as proposed by the Special Rapporteur, are reproduced in paragraph 721 below.

development on the topic, for no one set of universally accepted procedures was applicable in the sphere of prevention. His work, and that of the Commission, was guided by the need to evolve procedures enabling States to act in a concerted manner rather than in isolation.

676. One question that had arisen during consideration of the draft articles in the Sixth Committee was whether the duty of due diligence was in any way diluted by the requirement for States to negotiate a regime taking account of an equitable balance of interests where a risk of significant transboundary harm existed. As was indicated in the third report, the Special Rapporteur's view was that article 12 adopted on first reading merely defined the obligation in a mutually acceptable manner and only facilitated identifying and defining that obligation.

677. The most important point addressed in the third report was the question whether the Commission still needed to address the subtopic of hazardous activities within the broader categorization of "acts not prohibited by international law".

678. The question was dealt with in section VI of the third report. While State responsibility dealt with wrongful acts, international liability dealt with compensation for damage arising out of acts which were not necessarily prohibited by international law. Furthermore, prevention was essentially a question of the management of risk. The phrase "acts not prohibited by international law", originally intended to distinguish these activities from those covered by the topic of State responsibility, might not be necessary or, indeed, appropriate to define the scope of the regime on prevention. However, the concept could not be dispensed with easily. There was concern that if it was not emphasized that the activity was not prohibited, it could arguably be prohibited as a result of the failure of due diligence obligations. On this point the Special Rapporteur noted that none of the authorities he had surveyed had indicated that non-compliance with the obligation of due diligence made the activity itself prohibited. It did, however, give rise to a right of consultation between those who were likely to be affected and those who were promoting the activity, which was built into the entire concept of due diligence. In his opinion, deleting the reference to the words "acts not prohibited by international law" might not create further problems, and might even secure a greater consensus for the draft articles.

679. The Special Rapporteur indicated that in section V he had sought to address the great concern expressed by a number of States that by emphasizing the principle of prevention in isolation, rather than linking it to international cooperation, capacity-building and the broader themes of sustainable development, States would be discouraged from adopting the regime.

680. In order to encourage a broader consensus on the draft articles, the Special Rapporteur was of the view that necessary attention be paid to this concern in the preamble.

681. The Special Rapporteur indicated that some of the draft articles adopted on first reading had been changed, though these modifications were mainly of a drafting nature.

682. As regards article 2, he noted that subparagraph (a) had been redrafted in the light of comments made, so as to eliminate possible confusion because of the conjunction "and" used in the earlier version. The idea that the risk involved for the purpose of the draft articles was within a particular range from a high probability to a low probability of causing significant harm had been made more explicit. Subparagraph (f) was new, but it had been deemed necessary because of the frequent occurrence of the term in the draft articles.

683. The only change made to article 4 was the insertion of the word "competent" in order to highlight that not all international organizations in general were involved.

684. In relation to article 6, he noted that paragraph 1 was a redrafted version of the principle of prior authorization, but that the changes introduced were of a purely drafting nature in the light of comments made. Although the changes made to article 6, paragraph 2, were also essentially of a drafting nature, he felt that the provision could still face problems in its implementation with respect to acquired rights and foreign investment which could even lead to international claims. However, those were matters which should be sorted out by States in accordance with domestic law requirements and their international obligations.

685. Article 7 now contained the word "environmental" in the title and emphasized that any assessment of the environmental impact must, in particular, be based on the transboundary harm likely to be caused by the hazardous activity.

686. Article 8 simply introduced the term "States concerned", so as to indicate that both the State of origin and the States likely to be affected had a duty to provide their public with relevant information relating to the hazardous activity.

687. Article 9, without attempting to alter the substance of the previous article, brought out the requirement of suspending any final decision on prior authorization of the hazardous activity until a response from the States likely to be affected was received within a reasonable time, which in any case should not exceed a period of six months.

688. Article 10 left it open to States concerned to fix the time-frame for the duration of the consultations. A new paragraph had been added to article 10, reproducing paragraph 3 of article 13 as adopted on first reading with only one change. The provision inserted in article 10

emphasized that the State of origin might agree to suspend the activity in question for a reasonable period of time instead of the period of six months which had been suggested under the prior drafting. Moving that paragraph was considered necessary as reference to article 10 was made under article 12. The procedure to be followed would be the same, even if it was initiated at the request of States likely to be affected, but in that case, to the extent that it was applicable, such a procedure would have to deal with operations already authorized by the State of origin and in progress.

689. The text of articles 11, 12, 13, 15 and 19 corresponded to that of articles 12, 13,[332] 14, 16 and 17 as adopted on first reading. Article 14 now included the words "or concerning intellectual property".

690. New articles 16 and 17 had been added in response to suggestions made by States. Their addition in the framework of prevention had been considered justified since contingency measures or measures of preparedness were required to be put in place by every State as a measure of prevention or precaution. The content of these articles was essentially based on similar articles contained in the Convention on the Law of the Non-Navigational Uses of International Watercourses.[333] Article 18 reproduced the text of article 6 as adopted on first reading and had been moved in the interest of better presentation.

691. As regards the preamble he proposed, the Special Rapporteur noted that it was essential in order to accommodate, at least partially, the views of several States which had emphasized the right to development, a balanced approach to deal with the environment and development, the importance of international cooperation and the limits to freedom of States. They were ideas which pervaded the draft articles, and it was hoped that such a preamble, rather than specific articles dealing with those principles, would offer a reasonable basis for most States to accept the set of articles proposed. Such a preamble was also appropriate to a framework convention, which was the form in which the articles could be recommended for adoption.

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[332] With the exception of the removal of paragraph 3.

[333] General Assembly resolution 51/229 of 21 May 1997.

2. Summary of the debate

692. The Commission commended the Special Rapporteur for his revised version of the draft articles which took into account the various comments made by States and most members were of the view that the draft articles were ready for adoption.

693. The point was made that there was some difficulty with the emphasis, particularly in paragraphs 18 to 49 of the second report, on the duty of due diligence. Caution was needed, since reliance on that concept could create the very confusion with issues of State responsibility that the Special Rapporteur was trying to avoid. The point was also made that that reference to due diligence carried the implication that the draft would not apply to intentional or reckless conduct.

694. For his part, the Special Rapporteur noted that if a State undertook an activity that risked causing transboundary harm, it was expected to make the necessary assessments, arrange authorization and subsequently review the project to ensure that it conformed to a certain standard. The element of *dolus* or the intention or legality of the activity was not relevant to the purposes of the draft articles. If the activity was prohibited, other consequences would inevitably ensue and a State continuing such activity would have to take full responsibility for the consequences. Deleting the phrase "activities not prohibited by international law" would therefore make little difference, if the activities were illegal and were seen as such by States. In his view, the draft articles were concerned rather with mismanagement and the need for vigilance by all the States involved.

695. In relation to the legal nature of the principles, it was stated that the draft articles were a self-contained set of primary rules on risk management or prevention, and the work on the topic mainly entailed primary obligations of due diligence in essentially procedural form. The future convention would be without prejudice to higher standards and more specific obligations under other environmental treaties. The reference to customary international law in article 18 should be construed as relating solely to obligations under customary international law, not to the freedom of action. Non-compliance with the future convention would entail State responsibility unless procedures were developed as *leges speciales* under treaties on specific cases of pollution. The draft articles therefore did not overlap with State responsibility.

696. Regarding the scope of the draft articles, the Special Rapporteur expressed that they would cover all activities, including military ones, if they caused transboundary harm, assuming

that they were fully permissible under international law. The prevention articles would also apply to cases where there was no agreement or clear legal prescription that the activity involved was prohibited.

697. It was suggested that the draft articles could be revised in order to incorporate new developments in international environmental law, with a special emphasis on the precautionary principle and on issues relating to impact studies and, possibly, on the prevention of disputes.

698. In relation to the preamble proposed by the Special Rapporteur, the point was made that it would be very important to include references to positive international law, since there was a series of conventions that contained provisions with a direct bearing on the draft articles. Another observation made to the preamble was that it came down too heavily on the side of freedom of action. Mention might also be made of the obligation under general international law to look after the territory of one's neighbour: *sic utere tuo ut alienum non laedas*.

699. The view was expressed that the principle in preambular paragraph 5 merited being placed in an article in view of its importance.

700. There were divergent views as to the deletion of the phrase "activities not prohibited by international law". In this connection, a proposal was made to refer, in article 1, to obligations to prevent significant risks irrespective of whether the activities in question were or were not prohibited by international law. If an obligation was imposed because a significant risk was involved, why should it matter whether the activity was prohibited, and for reasons which might be totally unrelated to the risk? An activity might be prohibited under international law but not necessarily in relation to the State which might suffer the harm. Why should an obligation undertaken towards third States have an influence on the application of the draft articles? Why should it be important that a treaty existed between the State of origin and a third State when it came to procedures designed to prevent significant harm being caused to another State?

701. It was noted that by deleting the words "activities not prohibited by international law", there might be a need to review the entire text. One such example was article 6, wherein a new fourth paragraph might be inserted to indicate that illegal activities, prohibited by international law, could not be authorized.

702. In relation to the application of the duty of prevention to prohibited activities, it was stated that a distinction had to be drawn between activities prohibited under international environmental law and those prohibited by entirely different rules of international law such as those on disarmament.

703. For his part, the Special Rapporteur felt that the deletion of the phrase "activities not prohibited by international law" would not make it imperative to review the provisions of the draft articles. If an activity was illegal, the draft articles ceased to apply; it became a matter of State responsibility.

704. Those members who favoured retention of the phrase "activities not prohibited by international law" indicated that by deleting said phrase, the Commission would broaden the scope of the draft articles and would thus require the approval by States in the Sixth Committee. Furthermore, the effect of the recommendation in paragraph 33 of the report might be to weaken the notion of prohibition. It was questioned whether States engaging in prohibited activities would notify other countries concerned, even if they were aware that their activities could cause harm. Additional arguments for retaining the phrase included: the need for a link between the rules governing the duty of prevention and those governing the matter of international liability as a whole; the use of the phrase released a potential victim from any necessity to prove that the loss arose out of wrongful or unlawful conduct; maintaining the legal distinction between the topics of State responsibility and international liability.

705. The view was also expressed that the proposed deletion would be tantamount to legitimizing prohibited activities, which would not be acceptable.

706. For his part, the Special Rapporteur recalled that, in considering various drafts over the years, the Commission had concentrated not on the nature of various activities but on the content of prevention. Some members maintained that by retaining the phrase "activities not prohibited by international law" there was a danger of distracting the reader from the content of prevention by discussing which activities were prohibited and which were not. In order to avoid such a needless debate, he had made the recommendation contained in paragraph 33 of his third report, with which he had attempted to reassure those who were concerned about retaining the phrase "activities not prohibited by international law". Such activities would, however, still have to be subject to the provisions of articles 10, 11 and 12. If, on the other hand, an activity was clearly prohibited by international law, it was not for the draft articles to deal with the consequences.

707. With regard to draft article 3, the view was expressed that the definition of the obligation of prevention should be dealt with in a separate article.

708. As regards articles 6 and 11, their redrafting was advocated so as to provide that authorization was required for any kind of activity falling within the scope of those draft articles. The question was not whether an act was prohibited but whether it would involve a breach of an obligation by the State of origin to the State where the harmful consequences of an activity would be felt.

709. In relation to the question of harm caused to areas beyond national jurisdiction or to the global commons, the view was expressed that, although it would be difficult to cover that question at the present stage, the Commission could show that it was aware of the issue by making a reference to it in the preamble or in a "without prejudice" provision.

710. The point was made that at the core of the draft articles was the triggering for the State of origin of a duty of notification and consultation. Under article 9, the obligation to notify arose only when the State of origin had made an assessment that significant risk was involved. Although under article 7, the State of origin had an obligation to make such an assessment in a case of possible transboundary harm, it might be inclined not to carry out the assessment very thoroughly - partly because, if a risk of significant harm was detected, then the issue of further obligations would arise. The draft thus gave an incentive to the State of origin not to do precisely what was intended, namely, to give advance notice when there was a risk of significant harm.

711. As regards article 10 and the obligations incumbent on the State concerned once the risk of significant harm had been assessed, the point was made that it could be suggested that States consider the possibility of establishing a joint monitoring body to be entrusted with activities such as ensuring that the level of risk did not substantially increase and that contingency plans were properly prepared.

712. In relation to new article 16, the view was expressed that the phrase "where appropriate" could be deleted since it afforded States an escape clause that was both dangerous and useless.

713. As regards draft article 19, paragraph 2, it was pointed out that the provision contained omissions which could be overcome by drawing inspiration from article 39 of the Convention on the Law of the Non-Navigational Uses of International Watercourses.

714. As regards the final form to be given to the draft articles, the Commission concurred with the Special Rapporteur that a framework convention would be appropriate.

3. Special Rapporteur's concluding remarks

715. As regards the proposal to revise the draft articles in order to incorporate the new developments in the field of international environmental law, the Special Rapporteur recalled that the draft articles as adopted on first reading had proved acceptable to most States and therefore he recommended that the Commission retain the scope of the articles within manageable proportions, for otherwise there was a risk that work on the topic would be protracted even more.

716. Concerning the suggestion that the issue of the precautionary principle be addressed in the draft articles, the Special Rapporteur pointed out that, in his view, the precautionary principle was already included in the principles of prevention and prior authorization, and in the environmental impact assessment, and could not be divorced therefrom.

717. The Special Rapporteur noted that the division of opinion within the Commission over whether to remove or retain the reference in article 1 to "activities not prohibited by international law" was roughly equal. Whether it was retained or not, the real purpose of the article was risk management and to encourage States of origin and States likely to be affected to come together and consult among themselves. Emphasizing the obligation to consult at the earliest possible stage was the main value of the draft.

718. Concerning the question as to whether direct reference should be made within the terms of article 3 to the concept of due diligence, the Special Rapporteur was of the opinion that "all appropriate measures" and "due diligence" were synonymous and that the former was more flexible and less likely to create confusion than inserting a reference to the latter.

719. As for the settlement of disputes, he indicated that since article 19 had generally met with the approval of Governments, he proposed its retention without any changes.

720. The Special Rapporteur felt that a number of other suggestions made by the members of the Commission could be dealt with in the context of the Drafting Committee and he therefore recommended that the draft articles be referred to said Committee.

721. At its 2643rd meeting, on 20 July, the Commission agreed to refer the following draft preamble and revised draft articles 1 to 19, as proposed by the Special Rapporteur, to the Drafting Committee:

Draft preamble and revised draft articles proposed by the Special Rapporteur[334]

Convention on the Prevention of Significant Transboundary Harm

The General Assembly,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Recalling its resolution 1803 (XVII) of 14 December 1962, containing the Declaration on permanent sovereignty over natural resources,

Recalling also its resolution 41/128 of 4 December 1986, containing the Declaration on the Right to Development,

Recalling further the Rio Declaration on Environment and Development of 13 June 1992,

Bearing in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recognizing the importance of promoting international cooperation,

Expressing its deep appreciation to the International Law Commission for its valuable work on the topic of the prevention of significant transboundary harm,

Adopts the Convention on the Prevention of Significant Transboundary Harm, annexed to the present resolution;

Invites States and regional economic integration organizations to become parties to the Convention

Article 1

Activities to which the present draft articles apply

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" means such a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous harm ~~encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;~~

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[334] See A/CN.4/510, Annex. Changes to the text adopted on first reading have been indicated in bold or strikeout.

(b) "harm" includes harm caused to persons, property or the environment,

(c) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;

(e) "State likely to be affected" means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur,

(f) "States concerned" means the State of origin and the States likely to be affected.

Article 3

Prevention

States **of origin** shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Article 4

Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more **competent** international organizations in preventing, or in minimizing the risk of, significant transboundary harm.

Article 5

Implementation

States **concerned** shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Article 6 [7][335]

Authorization

1. The prior authorization of a State *of origin* shall be required for:

(a) all activities within the scope of the present draft articles carried out in the territory or otherwise under the jurisdiction or control of a State;

(b) any major change in an activity referred to in subparagraph (a);

(c) a plan to change an activity which may transform it into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles. **Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.**

3. In case of a failure to conform to the requirements of the authorization, the ~~authorizing~~ State **of origin** shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7 [8]

Environmental impact assessment

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall, **in particular,** be based on an **assessment** of the possible transboundary harm caused by that activity.

Article 8 [9]

Information to the public

States **concerned** shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

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[335] Article 6 has been moved towards the end of the draft articles and the remaining draft articles have been renumbered accordingly. The previous number of the draft articles appears between square brackets.

Article 9 [10]

Notification and information

1. If the assessment referred to in article 7 [8] indicates a risk of causing significant transboundary harm, the State of origin shall~~, pending any decision on the authorization of the activity,~~ provide the States likely to be affected with timely notification **of the risk and the assessment** and shall transmit to them the available technical and **all** other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on prior authorization of the activity pending the receipt, within a reasonable time and in any case within a period of six months, of the response from the States likely to be affected.

~~[2. The response from the States likely to be affected shall be provided within a reasonable time.]~~

Article 10 [11]

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm. **The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultations.**

2. **The** States **concerned** shall seek solutions based on an equitable balance of interests in the light of article **11** [12].

2 *bis*. **During the course of the consultations, the State of origin shall, if so requested by the other States, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a *reasonable* period ~~of six months unless otherwise agreed~~.**[336]

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

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[336] Former article 13, paragraph 3, with the addition of the term "***reasonable***".

Article 11 [12]

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article **10** [11], the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) the degree to which the State of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of prevention which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 12 [13]

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the **State of origin** ~~territory or otherwise under the jurisdiction or control of another State~~ may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article **9** [10]. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article **9** [10], it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article **10** [11].

~~**3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed.**~~[337]

Article 13 [14]

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, or minimizing the risk of, significant transboundary harm.

Article 14 [15]

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets **or concerning intellectual property** may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 15 [16]

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16

Emergency preparedness

States *of origin* shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other States likely to be affected and competent international organizations.

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[337] This paragraph has been moved to article 11, paragraph 2 *bis*.

Article 17

Notification of an emergency

States of origin shall, without delay and by the most expeditious means available, notify other States likely to be affected by an emergency concerning an activity within the scope of the present draft articles.

Article 18 [6]

Relationship to other rules of international law

Obligations arising from the present draft articles are without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law.

Article 19 [17]

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

CHAPTER IX

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

722. Having regard to paragraphs 8, 9 and 11 of General Assembly resolution 54/111 of 9 December 1999, the Commission considered the matter under item 8 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation" and referred it to the Planning Group of the Enlarged Bureau.

723. The Planning Group held four meetings. It had before it section E of the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session entitled "Other decisions and conclusions of the Commission".[338]

724. The Planning Group re-established the informal Working Group on split session as well as the Working Group on the long-term programme of work.[339]

725. At its 2664th meeting on 18 August, the Commission considered and endorsed the Planning Group's report.

1. Long-term programme of work

726. The Commission took note of the report of the Planning Group stating that, in terms of the method of work, and at the request of the Chairman, the members of the Working Group on long-term programme of work at the outset identified a number of subjects which might be useful to examine further as to their appropriateness to be recommended for inclusion in the long-term programme of work of the Commission. Those subjects dealt with different and important aspects of international law, such as human rights, environment, responsibility and treaties. Upon further examination the Working Group narrowed down the list to the following:

- Legal aspects of corruption and related practices
- Jurisdictional aspect of transnational organized crime
- Responsibility of international organizations
- The risk of the fragmentation of international law

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[338] A/CN.4/504.

[339] For the composition of the Working Groups, see paragraph 10 above.

- The right to collective security
- Humanitarian protection
- The effect of armed conflict on treaties
- The position of the individual in international law
- Right of asylum
- The law relating to the expulsion of aliens
- The international legal consequences of violations of human rights
- Non-discrimination in international law
- Feasibility study on the law of environment: guidelines for international control for avoidance of environmental conflict
- The precautionary principle
- Shared resources of States
- The polluter pays principle.

727. Each of the selected topics was assigned to a member of the Commission for a feasibility study to determine their potential for inclusion in the long-term programme of work.

728. The Commission took note of the report of the Planning Group stating that, with regard to the criteria for the selection of the topics, the Working Group, bearing in mind the recommendation of the Commission contained in paragraph 238 of the report on the work of its forty-ninth session,[340] had agreed that it should be guided by the following:

- that the topic should reflect the needs for the States in respect of the progressive development and codification of international law;
- that the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;
- that the topic should be concrete and feasible for progressive development and codification; and
- that the Commission should not restrict itself to traditional topics, but that it should also consider those that reflect new developments in international law and pressing concerns of the international community.

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[340] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10).

729. The Commission agreed with the conclusions of the Planning Group that, on the basis of the above criteria, and after careful examination of the preliminary studies on the above subjects the following topics are appropriate for inclusion in the long-term programme of work:

1. Responsibility of international organizations
2. Effects of armed conflict on treaties
3. Shared natural resources of States
4. Expulsion of aliens
5. Risks ensuing from fragmentation of international law

730. The syllabuses on topics recommended for inclusion in the long-term programme of work of the Commission is annexed to the present report.

731. The Commission took note that the last topic, "Risks ensuing from fragmentation of international law", was different from other topics which the Commission had so far considered. Nevertheless, the Commission was of the view that the topic involved increasingly important issues relating to international law and that the Commission could make a contribution to the better understanding of the issues in this area. The Commission also took note that the method and the outcome of the work of the Commission on this topic, while they did not fall strictly within the normal form of codification, was well within the competence of the Commission and in accordance with its Statute.

732. The Commission also took note of a number of useful preliminary studies with regard to the topic of the environment. But it was of the view that any decision about further work in the area of the law of the environment should usefully be deferred until the next quinquennium. In particular, it was noted that it was desirable to have a more integrated approach to the development of feasibility studies in the field of the environment.

733. The Commission also noted that two topics on issues related to Corruption and Humanitarian protection are worthy of further examination by the Commission, at its next quinquennium. But at the present session, the Commission was not in a position to make a recommendation for their inclusion in the list of topics for the long-term programme of work.

2. Length, nature and place of future sessions of the Commission

734. Having taken note of the report of the Planning Group, the Commission is of the view, as explained in detail in paragraphs 635 to 637 of its 1999 report,[341] that, in order to continue to

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[341] *Official records of the General Assembly, Fifty-fourth session, Supplement No. 10* (A/54/10).

increase the efficiency and productivity of its work and to facilitate the attendance by its members, the sessions of its next quinquennium should also be split into two half sessions of an equal duration. The Commission would, in principle, continue to meet in Geneva. However, in order to enhance the relationship between the Commission and the Sixth Committee, one or two of its half sessions could be held in New York, towards the middle of the mandate.

735. Furthermore, the Commission reiterates its views expressed in paragraph 227 of its 1996 report[342] to the effect that, "in the longer term, the length of sessions is related to the question of [its work] organization" and that "if a split session is adopted ... its work can usually be effectively done in a period of less than 12 weeks a year. It sees good reason for reverting to the older practice of a total annual provision of 10 weeks, with the possibility of extension to 12 weeks in particular years, as required". Consequently, and unless significant reasons related to the organization of its work otherwise require, the length of the sessions during the initial years of the Commission's future mandate should be of 10 weeks and, during its final years, of 12 weeks.

B. Date and place of the fifty-third session

736. Since the next session of the Commission will be the last of its present quinquennium, the Commission is of the view that the requirements of its work make it essential to hold a 12-week split session, at the United Nations Office in Geneva, from 23 April to 1 June and from 2 July to 10 August 2001.

C. Cooperation with other bodies

737. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Brynmor Pollard. Mr. Pollard addressed the Commission at its 2648th meeting on 28 July 2000 and his statement is recorded in the summary record of that meeting.

738. The Commission was represented at the 2000 session of the Asian-African Legal Consultative Committee, in Cairo, Egypt, by Mr. Gerhard Hafner who attended the session and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative

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[342] Ibid., *Fifty-first session, Supplement No. 10* (A/51/10).

Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Ambassador Wafik Kamil. Ambassador Kamil addressed the Commission at its 2654th meeting on 10 August 2000 and his statement is recorded in the summary record of that meeting.

739. The European Committee on Legal Cooperation and the Committee on Legal Advisers on Public International Law were represented at the present session of the Commission by Mr. Rafael Benítez. Mr. Benítez addressed the Commission at its 2655th meeting on 11 August 2000 and his statement is recorded in the summary record of that meeting.

740. At its 2658th meeting on 15 August 2000, Judge Gilbert Guillaume, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it. An exchange of views followed. The Commission finds it very useful and rewarding to continue this ongoing exchange with the Court.

741. On 27 July 2000, an informal exchange of views was held between members of the Commission and members of the legal services of the International Committee of the Red Cross on topics of mutual interest for the two institutions.

D. Representation at the fifty-fifth session of the General Assembly

742. The Commission decided that it should be represented at the fifty-fifth session of the General Assembly by its Chairman, Mr. Chusei Yamada.

743. Moreover, at its 2664th meeting on 18 August 2000, the Commission requested Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur on "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)" to attend the fifty-fifth session under the terms of paragraph 5 of General Assembly resolution 44/35.

E. International Law Seminar

744. Pursuant to General Assembly resolution 54/111, the thirty-sixth session of the International Law Seminar was held at the Palais des Nations from 10 to 28 July 2000, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or posts in the civil service in their country.

745. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.[343] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

746. The Seminar was opened by the Commission's Chairman, Mr. Chusei Yamada. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration and organization of the Seminar.

747. The following lectures were given by members of the Commission: Mr. Pemmaraju Sreenivasa Rao: "The Work of the ILC"; Mr. Christopher Dugard: "Diplomatic Protection"; Mr. Ian Brownlie: "The International Court of Justice"; Mr. Giorgio Gaja: "The concept of 'Injured State'"; Mr. Djamchid Momtaz: "Rome Statute of the International Criminal Court"; Mr. Victor Rodríguez-Cedeño: "Unilateral Acts of States"; and Mr. James Crawford: "Countermeasures".

748. Lectures were also given by Mr. Gudmundur Eiriksson, former Member of the Commission, Judge at the United Nations International Tribunal for the Law of the Sea: "The International Tribunal for the Law of the Sea"; Mr. Pieter Kuijper, Director, Legal Affairs Division, World Trade Organization: "WTO Dispute Settlement Mechanism"; Mr. Volker Türk, Legal Adviser, Division of International Protection, Office of the United Nations High Commissioner for Refugees (UNHCR): "International Protection of Refugees";

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[343] The following participated in the thirty-sixth session of the International Law Seminar: Mr. Abdelrahman Afifi (Palestinian); Mr. Chatri Archjananun (Thailand); Mr. Boukar Ary Tanimoune (Niger); Mr. Vidjea Barathy (India); Ms. Maria Manuela Farrajota (Portugal); Ms. Monica Feria Tinta (Peru); Mr. Márcio Garcia (Brazil); Ms. Julie Gaudreau (Canada); Mr. Mahmoud Hmoud (Jordan); Mr. Frank Hoffmeister (Germany); Mr. Mactar Kamara (Senegal); Mr. Konstantin Korkelia (Georgia); Mr. Davorin Lapas (Croatia); Mr. Erasmo Lara-Cabrera (Mexico); Ms. Carolane Mayanja (Uganda); Mr. Mischa Morgenbesser (Switzerland); Ms. Lipuo Moteetee (Lesotho); Ms. Karen Odaba (Kenya); Mr. Marcos Orellana (Chile); Mr. Guillermo Padrón-Wells (Venezuela); Mr. Payam Shahrjerdi (Islamic Republic of Iran); Ms. Maria Isabel Torres Cazorla (Spain); Ms. Barbara Tószegi (Hungary); Mr. Alain Edouard Traore (Burkina Faso). A Selection Committee, under the Chairmanship of Professor Nguyen-Huu Tru (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 18 May 2000 and selected 24 candidates out of 124 applications for participation in the Seminar.

Mr. Bertie Ramcharan, Deputy High Commissioner for Human Rights: "Activities of the Office of the High Commissioner for Human Rights"; and Mrs. Anne Ryniker, Legal Adviser, International Committee of the Red Cross (ICRC): "International Humanitarian Law and the Work of the ICRC".

749. Seminar participants were assigned to working groups whose main task consisted of preparing the discussions following each conference and of submitting written summary reports on each lecture. A collection of the reports was compiled and distributed to the participants. Under the guidance of Professor Gerhard Hafner, one group elaborated annotated bibliography on "The Effects of Armed Conflicts on Treaties".

750. Participants were also given the opportunity to make use of the facilities of the United Nations Library and to visit the Museum of the ICRC.

751. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama and Grand Council Rooms followed by a reception.

752. Mr. Chusei Yamada, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Ms. Monica Feria Tinta and Mr. Payam Shahrjerdi, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the thirty-sixth session of the Seminar.

753. The Commission noted with particular appreciation that the Governments of Denmark, Finland, Germany and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed to award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 12 candidates and partial fellowship (subsistence or travel only) to 5 candidates.

754. Of the 807 participants, representing 147 nationalities, who have taken part in the Seminar since its inception in 1965, 461 have received a fellowship.

755. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the

General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2001 with as broad a participation as possible. It has to be emphasized that, due to the increasingly limited number of contributors, the organizers of the Seminar had to draw on the reserve of the Fund this year. Should this situation continue, it is to be feared that the financial situation of the Fund will not allow the same amount of fellowships to be awarded in the future.

756. The Commission noted with satisfaction that in 2000 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, despite existing financial constraints.

F. Gilberto Amado Memorial Lecture

757. The fifteenth Memorial Lecture, in honour of Gilberto Amado, the illustrious Brazilian jurist and former Member of the Commission, was given on 18 July 2000 by Professor Alain Pellet, Professor of International Law at the University of Paris X-Nanterre, Member of the International Law Commission, on the subject "'Human Rightism' and International Law".

758. The Gilberto Amado Memorial Lectures have been made possible through the generous contributions of the Government of Brazil, to which the Commission expressed its gratitude. It requested the Chairman to convey its gratitude to the Government of Brazil.

Annex

Syllabi on topics recommended for inclusion in the long-term programme of work of the Commission

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RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

(Alain Pellet)

I. Need to include the topic in the Commission's agenda

Section IX of the General Scheme prepared by the Working Group on the Long-Term Programme of Work in 1996 and annexed to the report of the International Law Commission on the work of its forty-eighth session (General Assembly, Official Records, fifty-first session, Supplement No. 10, A/51/10) is entitled "Law of international relations/responsibility" (p. 333).

This section is particularly well supplied in topics already completed and topics under consideration, since it includes:

In heading 1 ("Topics already completed"), the three Vienna Conventions on Diplomatic Relations, Consular Relations and Special Missions, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons and the Commission's draft articles on the status of the diplomatic courier and the diplomatic bag;

In heading 2 ("Topics under consideration by the Commission"), State responsibility and international liability for injurious consequences of acts not prohibited by international law; and

In heading 3 ("Possible future topics"), diplomatic protection and functional protection, which have now been included in the Commission's agenda (since it appears to have been agreed that functional protection will, at some point or another, be considered jointly with diplomatic protection *stricto sensu*), the international representation of international organizations and the international responsibility of international organizations.

The latter topic thus appears to come, by definition, within the sphere of competence of the Commission, which has successfully been carrying out the tasks of the progressive development and codification of international law in this field.

Moreover, the topic is the logical and probably necessary counterpart of that of State responsibility, the consideration of which will be completed by the end of the present quinquennium in 2001. It is therefore particularly appropriate that it should follow on from the topic of State responsibility, just as the topic of treaties between States and international organizations or between international organizations followed on from that of the law of treaties (between States) in 1969. Otherwise, the general topic of responsibility, which is, together with the law of treaties, one of the pillars of the Commission's work and probably its "masterpiece", would be incomplete and unfinished.

The question of the responsibility of international organizations has, moreover, been dealt with by the Commission a number of times during its study of State responsibility (cf. ILC, *Yearbook ... 1973*, vol. II, p. 169, and ILC, *Yearbook ... 1975*, vol. II, p. 87).

The topic of the responsibility of international organizations also appears in every respect to meet the criteria that the Commission identified in 1997 and reiterated in 1998 for the selection of topics to be included in its long-term programme of work (cf. *Report of the International Law Commission on the work of its forty-ninth session*, General Assembly, Official Records, fifty-second session, Supplement No. 10, A/52/10, para. 238, p. 154 and *Report of the International Law Commission on the work of its fiftieth session*, General Assembly, Official Records, fifty-third session, Supplement No. 10, para. 553, p. 219):

It reflects the needs of States (and of international organizations), as shown by the statements along these lines made by several representatives in the Sixth Committee at the fifty-second session of the General Assembly; in addition, many specific problems arise in this regard and they should become increasingly numerous in view of the resumption of the operational activities of international organizations and, in particular, activities by the United Nations to maintain international peace and security, the implementation of the operational part of the Montego Bay Convention on the Law of the Sea and the space activities of some regional international organizations; recent cases (including the collapse of the International Tin Council in 1985: cf. Ilona Cheyne, "The International Tin Council", I.C.L.P., 1989, pp. 417-424 and 1990, pp. 945, 952; Pierre-Michel Eisemann, "Crise du Conseil international de l'Étain et insolvabilité d'une organisation intergouvernementale", A.F.D.I. 1985, pp. 730-746, and "L'épilogue de la crise du Conseil international de l'Étain", A.F.D.I. 1990, pp. 678-703; E.J. McFadden, "The Collapse of Tin: Restructuring a Failed Commodity Agreement", A.J.I.L. 1986, pp. 811-830; Philippe Sands, "The Tin Council litigation in the English Courts", N.I.L.R. 1987, pp. 367-391; Ignaz Seidl-Hohenveldern, "Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the English Court of Appeals", G.YB.I.L. 1989, pp. 43-54; and Ralph Zacklin, "Responsabilité des organisations internationales", in S.F.D.I., Le Mans Colloquium, *La responsabilité dans le système international*, Pédone, Paris, 1991, pp. 86-100) clearly confirm this "need for codification";

It is "sufficiently advanced in stage in terms of State practice", which is not well known, but now quite abundant (the United Nations Juridical Yearbook nevertheless provides some interesting leads in this regard);

It is entirely concrete and its consideration will be facilitated by the work carried out on State responsibility, which provides a conceptual framework into which it will have to be fitted; in addition, as shown in the brief bibliography to this note, there is now a considerable body of legal writings on this topic.

In conclusion, the topic of responsibility of international organizations seems to be one that is particularly well-suited to speedy inclusion in the Commission's agenda. This was also the position of the Working Group on Long-Term Programme of Work in 1998 which the Commission took note of (*Report of the International Law Commission on the work of its fiftieth session*, op. cit., para. 554, p. 218). This should be stated in the report to the General Assembly this year to enable the Commission to know the reactions of States and decide whether to set up a working group or to appoint a special rapporteur in 2000 so that the preliminary work may be completed by the end of the present quinquennium and the consideration of draft articles may begin in the first year of the next quinquennium.

II. Preliminary general scheme

Note: The starting principle is that, "in addition to the general rules in force in the field of State responsibility, the international law of responsibility as it applies to international organizations includes other special rules required by the particular features of these topics (with regard, *inter alia*, to categories of acts, limits to responsibility resulting from the functional personality of organizations, the combination of wrongful acts and responsibilities and settlement machinery and procedures in respect of responsibility as it affects organizations") (Manuel Pérez González, "Les organisations internationales et le droit de la responsabilité", *R.G.D.I.P.* 1988, p. 99, and, along the same lines, R. Zacklin, op. cit., p. 92). The Commission's draft articles on State responsibility are thus a legitimate starting point for the discussion, which will also have to deal with the adaptations that those draft articles will require.

Note: One of the problems of the topic is that the draft on State responsibility is silent on the rights of an international organization injured by an internationally wrongful act of a State. This gap should be filled during the consideration of the responsibility of international organizations. This might be done either in a separate part or, as proposed in this paper, in connection with questions relating to the "passive responsibility" of international organizations. Both of these solutions offer advantages and disadvantages.

(1) Origin of responsibility

(i) General principles

Principle of the responsibility of an international organization for its internationally wrongful acts;

Elements of an internationally wrongful act;

Exclusion of liability;

Exclusion of conventional regimes of responsibility.

Note: Conventional regimes of responsibility of international organizations are relatively numerous (cf. the example, which has been commented on extensively, of article XXII of the 1972 Convention on International Liability for Damage Caused by Space Objects); their "exclusion" obviously does not mean that such special mechanisms must not be carefully studied in order to determine whether general rules can be derived from them.

Exclusion of the organization's internal law (responsibility of the organization in respect of its officials).

Note: The latter problem probably warrants in-depth discussion.

(ii) Attribution of an internationally wrongful act to an organization

Attribution to an organization of the conduct of its organs;

Attribution to an organization of the conduct of organs placed at its disposal by States or by international organizations;

Attribution to an organization of acts committed *ultra vires*.

Note: This question, which is the subject *mutatis mutandis* of article 10 of the draft articles on State responsibility, is of particular importance in connection with the responsibility of international organizations, particularly because of the principle of speciality, which limits their powers.

(iii) Violation of an international obligation

Note: The provisions of Chapter III of Part One of the Commission's draft articles on State responsibility (arts. 16 to 26) could be transposed without too many difficulties, except for the former article 22 (which is to be included, on second reading, in Part Two *bis* of the draft) on the exhaustion of local remedies, a problem for which solutions involving the progressive development of international law would probably have to be found (see also (3) (ii) below).

Note: It might be asked whether this chapter (or a separate chapter (iii) *bis*) would be the right place in which to consider the activities of an organization which are liable to give rise to responsibility (operational activities; acts taking place at the organization's headquarters or in another territory where the organization acts; activities giving rise to technological damage; normative activities; international agreements, etc.; this list is taken from the above-mentioned article by Manuel Pérez González, pp. 85-92). The answer to this question should be categorically negative: such an intrusion into primary rules would inevitably lead to the breakup of the regime of responsibility and give the draft an entirely different connotation from that of the draft on State responsibility.

(iv) Combination of responsibilities

Note: This is probably one of the aspects of the topic on which the differences with State responsibility (cf. Chapter IV of Part One of the draft) are the most marked because of the particular nature of international organizations.

Implication of an international organization in an internationally wrongful act of another international organization;

Implication of a State in an internationally wrongful act of an international organization;

Responsibility of an international organization for an internationally wrongful act of a State committed pursuant to its decisions;

Responsibility of a member State or States for an internationally wrongful act of an international organization.

Note: The last two points give rise to difficult problems of joint and joint and several responsibility, which were not dealt with in the draft articles on State responsibility adopted by the Commission on first reading, but probably will be on second reading.

(v) Circumstances precluding wrongfulness

Note: Here again, the transposition of the principles embodied in Chapter V of Part One of the draft articles on State responsibility (arts. 29 to 35) should not give rise to any particularly sensitive problems, except, however, with regard to countermeasures (art. 30).

(2) Consequences of responsibility

(i) General principles

Note: The principles embodied in Chapter I of Part Two of the draft articles on State responsibility can probably also be transposed (subject to the far-reaching changes in some of them that are expected on second reading).

(ii) Obligations of an international organization which commits an internationally wrongful act and rights of an international organization injured by an internationally wrongful act of a State or of another international organization

Cessation of the wrongful conduct;

Assurances and guarantees of non repetition;

Obligation of reparation;

Forms and modalities of reparation (*restitutio in integrum*, compensation, satisfaction);

Beneficiaries of reparation (another international organization, a member State, a non-member State, private individuals).

(iii) Consequences of a combination of responsibilities

Note: The consequences of a combination of responsibilities (referred to above, (1) (iv)) may be so complicated that it will probably be necessary to devote an entire chapter to them; this may, moreover, turn out to be necessary in the case of State responsibility.

(iv) Reactions to an internationally wrongful act of an international organization and reactions of an international organization to an internationally wrongful act of a State

Countermeasures by an injured non-member State or by another international organization which has been injured;

Possible reactions by a member State of the organization;

Countermeasures by an international organization injured by an internationally wrongful act of another international organization or a non-member State;

Possible reactions by an international organization to an internationally wrongful act of a member State.

Note: The problem of countermeasures is delicate in itself and is certainly all the more so in the case of international organizations. It is obvious that, if the draft on State responsibility provides for the possibility of resorting to countermeasures, there is no reason to pass over the problem in silence in the case of the present topic: non-member States must be able to react to internationally wrongful acts of international organizations in the same way as to the internationally wrongful acts of other States and, reciprocally, an international organization (an integration organization, in particular) must be able to take countermeasures in response to an internationally wrongful act of a State or another international organization. However, it must also be asked whether the draft should include the question of relations between the organization and its members (when the constituent instrument does not regulate them).

[(v) International crimes

Note: This is indicated by way of a reminder. It is not ruled out that, like a State, an international organization may commit a crime within the meaning of article 19 of the draft on State responsibility as it now stands. There is no need to reopen the lengthy debate on this point to which the question has already given rise. The solution that will be adopted for States will probably be able to be transposed in the case of international organizations, with any adaptations required by the regime ultimately adopted.]

(3) Implementation of responsibility

(i) Protection of private individuals and officials of the organization

The functional protection exercised by an organization vis-à-vis a State or another international organization which has committed an internationally wrongful act causing harm to one of its officials;

Diplomatic protection exercised by a State vis-à-vis an international organization which has committed an internationally wrongful act causing harm to one of its nationals.

Note: This heading is not necessary if these questions are considered and decided in connection with the topic of diplomatic protection.

(ii) Settlement of disputes

Note: Just as there might be serious doubts about the justification for including a section on the settlement of disputes in the draft articles on State responsibility, so this may be advisable in the case of the responsibility of international organizations, which do not have access to the International Court of Justice and do not offer internal settlement mechanisms that are equivalent to those that exist within States, although, in principle, their immunities protect them against proceedings instituted against them in national courts. This will, in any event, only help to develop the international law in force.

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THE EFFECT OF ARMED CONFLICT ON TREATIES

(Ian Brownlie)

A. General comment

This element was set aside by the Commission in its work on the law of treaties and forms part of the savings clause in the Vienna Convention (art. 73). The topic was examined by the *Institut de droit international*, 1981-85; see the *Annuaire*, 59 (1981) i, 59 (1982) ii, 61 (1985) i, and 61 (1986) ii. A resolution was adopted at the Helsinki Session in 1985.

The topic has not been the subject of comprehensive study with the exception of the work of the *Institut de droit international*.

The resolution adopted by the *Institut* is not comprehensive and did not fully reflect the helpful studies produced by the Special Rapporteur, Mr. Bengt Broms. In any case the literature on the subject is less than satisfactory. The subject is surely ideal for codification and/or progressive development. On the one hand there is considerable State practice and experience and, on the other hand, there are elements of uncertainty. As the editors of the ninth edition of *Oppenheim's International Law* observe (at p. 1310): "The effect of the outbreak of hostilities between the parties to a treaty upon the validity of that treaty is far from settled ... ."

The law remains to a considerable degree unsettled. The transition from the use of "war" or a "state of war" as relevant categories to the use of the locution "armed conflict" has not resulted in a mature alternative legal regime. The practice of States as to the effects of armed conflicts on treaties varies.

These uncertainties in the legal sources and in the practice of States are compounded by the appearance of new phenomena including different forms of military occupation of territory and new types of international conflict.

The topic received a wide range of support in the Working Group. It was generally recognized that there is continuing need for the clarification of the law in this area.

B. Schema

1. The Definition of Armed Conflict
   - (i) Issue of magnitude;
   - (ii) Relevance of declaration of war;
   - (iii) Effect of military occupation in absence of a state of war.

2 The Definition of a Treaty for present purposes

3 Is a classification of Treaties necessary?

4 The Incidence of the Right of Suspension or Termination

- (i) Not an *ipso facto* consequence of armed conflict;
- (ii) Treaties which by their nature and purpose operate in respect of an armed conflict;
- (iii) The Indicia of Susceptibility of Bilateral Treaties to Suspension or Termination;
- (iv) The Indicia of Susceptibility of Multilateral Treaties to Suspension or Termination

5 Factors affecting the Right of Suspension or Termination other than the nature and purpose of the Treaty concerned

- (i) The effect of non-forcible countermeasures;
- (ii) The incompatibility *ex post facto* of a treaty with the right of individual or collective self-defence;
- (iii) The existence of provisions involving *jus cogens*;
- (iv) The incompatibility of a treaty with resolutions of the Security Council adopted by virtue of Chapter VII of the Charter

6 The modalities of suspension and termination and the reinstatement of a Treaty subsequent to suspension

7 Certain collateral issues

- (i) The illegality of the use or threat of force by the suspending or terminating State;
- (ii) The relation of the topic to the status of neutrality

8 The relation of the topic to other grounds of termination or suspension already specified in the Vienna Convention of 1969. This relates in particular to impossibility of performance and fundamental change of circumstances

9 The separability of treaty provisions in cases of suspension or termination

SHARED NATURAL RESOURCES OF STATES

(Robert Rosenstock)

The Commission could usefully undertake a topic of "Shared Natural Resources" focused exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas.

The effort should be limited to natural resources within the jurisdiction of two or more States. The environment in general and the global commons raise many of the same issues but a host of others as well.

There can be no doubt that sustainable development requires optimal use of resources. The finite nature of natural resources, combined with population growth and rising expectations, is a potential threat to the peace unless clear guidelines are developed and followed with regard to shared natural resources.

The work of the International Law Commission on Watercourses and Liability underscores its capacity to produce norms or guidelines assuming a general instrument is envisaged rather than a resource specific approach (e.g. water, oil and gas, minerals, living resources). The latter approach would perhaps be better undertaken by bodies with technical expertise.

It would seem prudent for the Commission to consider involving States and other relevant organizations, intergovernmental and non-governmental, in the decision whether to proceed with the exercise. The Secretary-General should be asked to consult with the relevant United Nations bodies and report. The landscape is full of excellent proposals by UNEP bodies and others to which too little heed has been paid not to mention the ongoing work of the United Nations Commission on Sustainable Development and other bodies. The function of these suggestions is to decrease the risk of the final product being irrelevant and/or ignored and to avoid contributing to what Professor E. Brown Weiss calls "treaty congestion". It is moreover a reflection of the belief that the Commission may be in a position to benefit in this exercise from cooperation with other bodies and to encourage the potential early involvement of the latter.

Requesting Government and other comments by 1 January 2000 may further focus attention on the exercise *ab initio*.

All of this having been said, the question remains whether the Commission should consider taking on both the topic of General Principles of Environmental Law and a topic on Shared Natural Resources?

Outline

1. Scope: In order to contain and focus the effort, it should be limited to natural resources within the jurisdiction of two or more States. The global commons raises many of the same issues but a host of others as well.

2. Form: Whether the final product should take the form of guidelines, a declaration, a convention or whatever should be decided at a much later stage but could feature as one of the questions to be asked of Governments and others.

3. Applicable principles

   (a) The duty to cooperate;

   (b) Equitable and reasonable utilization and participation

      (i) factors relevant to equitable and reasonable utilization;
      (ii) unitization;

      (iii) examples of regimes for shared resources.

   (c) Prevention and abatement of significant harm, procedure for situations in which harm is caused;

   (d) Exchange of data and information;

   (e) Management

      A joint management mechanism;

   (f) Non-discrimination.

4. Issues specific to situations where no boundary exists (Libya-Malta).

5. Settlement of disputes

Additional possibilities

6. Technology transfer

7. Financial mechanisms

8. Possible alternative regimes for distribution

   Suggested criteria for distributing the shares resources among the States in whose territory it exists and whose boundary it crosses.

All three of these "additional possibilities" are probably too political for independent experts and probably too situation or substance specific.

Selected documents

GA Res. 3129 (1973) ILM XVII 232

> "... necessary to ensure effective cooperation between countries through the establishment of adequate international studies for the conservation and harmonious exploitation of natural resources common to two or more States ..."

UNEP/GC/44 Corr.1 and 2 and Add.1

GA Res. 3281 (1974) ILM XIV 251

UNEP. "Draft Principles", UNEP, ILM XVII: 1098

The Rio Declaration on Environment and Development, 14/6/92, A/Conf.151/5/Rev.1 31 ILM 874 (1992)

The Stockholm Declaration of the United Nations Conference on the Human Environment

Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development UNST/DPCSD 05/B2/3 (1996)

Report of the Working Group on Sustainable Liability for Injurious Consequence Arising out of Acts not Prohibited by International Law. Report of the ILC (1998) at 235 et seq.

Rio Declaration on Environment and Development: Application and Implementation, Report of the Secretary-General, E/CN17/1997/8 (10/2/97)

EXPULSION OF ALIENS

(Emmanuel A. Addo)

Introduction

The right of States to expel aliens has never been in doubt. States are generally recognized as possessing the power to expel aliens. Just like the power States have to refuse admission to aliens, this is regarded as an incident of sovereignty. In 1869, the United States Secretary of State, Mr. Fish observed that: "the control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State are too clearly within the essential attributes of sovereignty to be seriously contested." (See Whiteman's Digest volume 8, p. 620) Shigeru Oda in the manual of Public International Law (1968 p. 469 at 482, edited by Sorensen), stated the common view that:

> "the right of a State to expel, at will, aliens whose presence is regarded as undesirable, is like the right to refuse admission of aliens, considered as an attribute of sovereignty of the State ... The grounds for expulsion of an alien may be determined by each State by its own criteria. Yet the right of expulsion must not be abused".

This principle is also accepted in the Literature on Public International Law. The current edition of Oppenheim accepts this principle and says thus:

> "On the other hand, while a State has a broad discretion in exercising its right to expel aliens, its discretion is not absolute" (See Oppenheim's International Law 9th Edition Vol. 1, p. 940).

So therefore although the expulsion of aliens rests solely with municipal law, the decisive influence of international law is apparent.

The State, which is in possession of a wide discretionary power, is prohibited by customary international law from expelling an alien if there is not sufficient reason to fear that public order is endangered. The rule of non-discrimination and the prohibition of the abuse of rights are additional restrictions on expulsion. An expulsion which encroaches upon the human rights protected by the International Covenant on Civil and Political Rights of 1966 or regional instruments such as the African Charter of Human and Peoples' Rights, the European Convention on Human Rights, of 1950 and the American Convention on Human Rights might be unlawful for the respective signatory or ratifying State.

Where the procedure for expulsion itself constitutes an encroachment upon Human Rights, the expulsion itself, although it may be reasonably justified, would be categorized as contrary to International Law.

An alien admitted to the territory of a State and having been granted asylum cannot be expelled without regard to the principle of non-refoulement, which is a general principle of Public International law as adopted by article 33 (1) of the Geneva Convention relating to the Status of Refugees of 1951, which prohibits a refugee who has already gained access to a State from being returned to a country persecuting him or her on the basis of race, creed, nationality or political opinion.

International law also prohibits collective or mass expulsion which is expressly precluded by article 4 of the Fourth Protocol to the European Convention on Human Rights of 1963, article 22 of the American Convention on Human Rights of 1969 and article 12 (5) of the African Charter of Human and Peoples' Rights of 1981.

General Scope

Definition

Expulsion refers to the order a Government of a State gives advising an alien or a stateless person to leave the territory of that State within a fixed and invariably short period of time. Such an order is generally combined with the announcement that it will be enforced, if necessary by deportation. Simply put, expulsion means the prohibition to remain inside the territory of the ordering State, it does not matter whether the alien concerned is passing through the territory, or is staying only for a brief period, or has established residence in the territory of the said State.

These differences may be of importance however, regarding the legality of the expulsion in a given case since provisions of treaties could be of influence here.

Distinction between expulsion and non-admission

Expulsion differs from non-admission or refusal of entry, in that in the case of non-admission the alien is prevented from entering the territory of the State whereas expulsion concerns aliens whose entry, and in a given case residence, has been permitted initially. Where an alien has entered the territory of a State illegally without the awareness of this by the State authorities, and is afterwards deported, it may raise a doubt whether this action by the State constitutes an expulsion or a refusal of entry. This however may be a distinction without a difference, since the result legally speaking in both cases could be coercive deportation.

Purpose of Expulsion

To preserve the public security of the State (Ordre public).

Expulsion must be distinguished from extradition in this case. Extradition is mainly carried out in the interest of the requesting State, whereas expulsion is performed in the exclusive interest of the expelling State. Extradition does need the consensual cooperation of at least two States, whereas expulsion is a unilateral act.

Lawfulness of Expulsion

Whether or not a foreign national may lawfully be expelled rests within the discretionary power of the Government of the expelling State.

A duty not to expel and a duty to give reasons for expulsion may arise from international treaties e.g. the United Nations Covenant on Civil and Political Rights or regional treaties e.g. European and American Conventions and the African Charter of Human and Peoples' Rights.

If the alien's expulsion constitutes an abuse of rights, the alien's State of nationality is entitled to exercise diplomatic protection. And in the implementation of the expulsion order, States are under an obligation not to violate human rights.

Mass or Collective Expulsion

1. Expulsion of a large group of people is not as such prohibited under international law.

2. Such an expulsion is prohibited, however, when it is tainted with discrimination or arbitrariness.

3. The American and the European Conventions on Human Rights put a stress on the prohibition of arbitrariness with respect to mass expulsions. The term used is collective expulsion. The aforementioned conventions also contain a general prohibition of discrimination.

4. The African Charter of Human and Peoples' Rights puts the emphasis on the prohibition of discrimination with respect to mass expulsions. The African Charter also contains a general provision of arbitrariness.

5. Universal human rights law also contains a prohibition of mass expulsion as a discriminatory and arbitrary measure.

Consideration of specific cases of mass or collective expulsion

Post World War II

The grounds on which refugees or stateless persons can be expelled are limited by treaty. These grounds are likely to be ignored when refugees or stateless persons become involved in mass expulsion.

Migrant workers

Consideration and discussion of the United Nations Convention on

(a) the Protection of the Human Rights of All Migrant Workers and Members of Their Families.

Does Article 22 of the above Convention contain a correct statement of current international law with regard to mass expulsion of legal and illegal aliens, migrant workers, etc.

(b) Treaties specifically applicable to migrant workers prohibit arbitrary expulsion and limit the grounds upon which such expulsion can be based.

RISKS ENSUING FROM FRAGMENTATION OF INTERNATIONAL LAW[1]

(Gerhard Hafner)

A. ISSUE

In recent time, particularly since the end of the cold war, international law has become subject to a greater fragmentation than before. A major factor generating this fragmentation is the increase of international regulations; another factor is the increasing political fragmentation juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction.

It can therefore easily be assumed that, presently, there exists no homogeneous system of international law. As it has been noted at several occasions even during recent discussions in the International Law Commission, *inter alia* on State responsibility, existing international law does not consist of one homogenous legal order, but mostly of different partial systems, producing an "unorganized system".

Hence, the system of international law consists of erratic parts and elements which are differently structured so that one can hardly speak of a homogeneous nature of international law.[2] This system is full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different levels of legal integration.[3]

This nature of international law resulting from separate erratic legal subsystems undoubtedly has a positive effect insofar as it enforces the rule of law in international relations; nevertheless, it is exposed to the risk of generating frictions and contradictions between the various legal regulations and creates the risk that States even have to comply with mutually exclusive obligations. Since they cannot respect all such obligations, they inevitably incur State responsibility.

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[1] This paper was elaborated with assistance of Ms. Isabelle Buffard and Messrs. Axel Marschik and Stephan Wittich.

[2] Cf. Raza Mooms, "Citizens of a Wounded Earth in a Fragmented World", in: Gangrade K.D., Misra R.P. (ed), *Conflict Resolution through Non-Violence*, New Delhi, 1990, vol. 2, pp. 11-23 (22); Camilleri Joseph A., "Fragmentation and Integration: The Future of World Politics", in: Ibid., pp. 45-63 (45).

[3] As to the increase of fragmentation in particular after the end of the cold war see: Reisman Michael W., "International Law after the Cold War", in: *AJIL* vol. 84, 1990, pp. 859-866 (864); Fry Earl H., "Sovereignty and Federalism: U.S. and Canadian Perspectives. Challenges to Sovereignty and Governance", *Canada-United States Law Journal* vol. 20, 1994, pp. 303-317 (303); Delbruck Jost, "A More Effective International Law or a 'New World law'", *Indiana Law Journal* vol. 68, 1993, pp. 705-725 (705).

The primordial task of the ILC is the codification and progressive development of international law (Art. 13 United Nations Charter) in the interest of the stabilization of international law and, consequently, international relations. Since the fragmentation of international law could endanger such stability as well as the consistency of international law and its comprehensive nature, it would fall within the purview of the objectives to be attained by the ILC to address these problems. Hence, the ILC should seek for ways and means to overcome the possible detrimental effects of such fragmentation. As will be shown, the ILC already possesses the necessary means for this purpose.

Certain examples may illustrate the risks which this situation of existing international law could entail.

B. ILLUSTRATIVE CASES

1. The Charter of the United Nations and other Obligations under International Law

A striking example may be construed as follows. The Ad-hoc Tribunal for former Yugoslavia, which is only bound by the Charter of the United Nations, requests a State to take certain measures which are not in conformity with the obligations incumbent upon this State by virtue of human rights conventions. Article 103 of the Charter of the United Nations, which enshrines the prevalence of obligations under the Charter of the United Nations over any other treaty, deprives the State of the right to invoke those conventions, irrespective of the fact that the individual concerned may bring the matter before the relevant human rights bodies. With regard to the standard of human rights protection, a comparison of the procedural guarantees contained in the Statute of the ICTY[4] (including the rules of procedure and evidence) with generally accepted standards of fair trial, in particular with those embodied in the International Covenant on Civil and Political Rights, reveals two serious shortcomings of the Statute.[5] First, the Statute does not contain a clear guarantee of ***nullum crimen sine lege***; and, second, the Statute lacks an explicit ***ne bis in idem*** provision. Thus, if a State party to the Covenant conforms to the request of the Tribunal and the Tribunal does not adhere to one of these basic standards of fair trial the State will have to breach its obligations owed to the individual under the Covenant. Furthermore, if the individual concerned refers this matter to the relevant human rights body, the latter will be confined to examining only whether the State has or has not violated the respective human rights convention. The treaty body will not be competent to review the obligations stemming from the request of the ICTY and, eventually, from SC Res 827. Existing international law does not provide a clear guidance for solving this problem.[6]

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[4] International Criminal Tribunal for former Yugoslavia.

[5] A. Reinisch, "Das Jugoslawien-Tribunal der Vereinten Nationen und die Verfahrensgarantien des II. VN-Menschenrechtspaktes. Ein Beitrag zur Frage der Bindung der Vereinten Nationen an nicht-ratifiziertes Vertragsrecht", *ÖZÖRV* 47 (1995), pp. 173-213, at pp. 177-182. The hypothetical case mentioned in the text is detached from the problem scrutinized by ***Reinisch***, i.e. the question of whether the Tribunal is bound by treaty or customary law.

2. Immunity and Human Rights Obligations

Similarly, the question has already arisen whether immunity based on international agreements or general international law can be invoked by States parties as exceptions to their obligations under the Human Rights Conventions before Human Rights bodies. In a recent case, the European Commission of Human Rights took the view that the immunity from jurisdiction accorded to international organizations or members of diplomatic or consular missions of foreign States cannot be regarded as delimiting the very substance of substantive rights under domestic law. The Commission *inter alia* stated that to confer on large groups or categories of persons immunities from civil liability would run counter to article 6, paragraph 1 ECHR.[7] The Commission, nevertheless, concluded that in the case in question no violation of article 6, paragraph 1 of the Convention had occurred because a reasonable relationship of proportionality can be said to have existed between the rules on international immunity and the legitimate aims pursued by the European Space Agency (ESA) as an international organization.[8] The European Court of Human Rights came to the same conclusion.[9] The organs of the ECHR stated at the same time that it would be incompatible with the purpose and object of the Convention if the contracting States were absolved from their responsibility under the Convention in relation to the field of immunities.[10]

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[6] See G. Hafner, "Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?", in L. Caflisch (ed.), *The Settlement of Disputes between States: Universal and European Perspectives*, 1998, pp. 25-41; see also the symposium on "Proliferation of International Tribunals: Piecing Together the Puzzle", *NYU Journal of International Law and Politics* 31 (1999), pp. 679-970.

[7] European Commission of Human Rights, Application No. 26083/94 *Richard Waite and Terry Kennedy v. Germany*, Report of the Commission adopted on 2 December 1997, § 53 and §54. See also *Beer and Regan v. Germany*, Application No. 28934/95, Report of the Commission adopted on 2 December 1997.

3. International Trade Regulations and International Environmental Regulations

Another example of this kind might also be seen in the relationship between international regulations dealing with international trade and the protection of the environment and sustainable development.[11] Whereas the international trade regime, established by the WTO, *inter alia*, aims at the "substantial reduction of tariffs and other barriers to trade"[12] and prohibits quantitative restrictions,[13] some environmental conventions make use of trade measures in order to ensure their effectiveness.[14] This may give rise to certain tensions between the various norms of international law.

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[8] See I. Seidl-Hohenveldern, "Functional Immunity of International Organizations and Human Rights" in W. Benedek, H. Isak and R. Kicker (eds.), *Development and Developing International and European Law*, Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday, 1999, pp. 137-149.

[9] *Case Waite and Kennedy v. Germany*, 18 February 1999, § 73, *Case Beer and Regan v. Germany*, same date: "Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German Courts with regard to ESA impaired the essence of their 'right to a court' or was disproportionate for the purposes of article 6 § 1".

[10] Ibid., § 67. In their dissenting opinion to the report on the case of *Richard Waite and Terry Kennedy v. Germany*, 15 members of the European Commission of Human Rights stated that immunities of international organizations could not be considered as a kind of general unwritten exception to the scope of application of the ECHR.

[11] Cf. e.g. the works undertaken by the GATT Working Party on Environmental Measures and International Trade (now WTO: Trade and Environment Committee) or the OECD Trade and Environment Expert Committee; cf. further C. Stevens, OECD Trade and Environment Programme, 1 RECIEL (1992), 55s; UNEP Doc. UNEP/GC.20/INF/16 of 19 January 1999, Study on Dispute Avoidance and Dispute Settlement in International Environmental Law, Ch. IV.B.1.a, 56s.

[12] General Agreement on Tariffs and Trade, Preamble, para. 3, reprinted in WTO (ed.), The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts (1994), 486ss.

4. International Regulations on Broadcasting

A further striking example could be found in the various attempts to regulate satellite broadcasting. On the one hand, the International Telecommunication Union (ITU) tried to solve this problem by means of the World Administrative Radio Conference (WARC) in 1977, on the other hand UNESCO became involved through its "Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education, and Greater Cultural Exchange" of 1972. Finally, the matter was discussed in the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space where the final declaration governing these activities was elaborated.[15] Nevertheless, certain doubts concerning compatibility of these principles and the relevant regulations elaborated under the auspices of the ITU are even today not yet totally removed.

5. The Law of the Sea Convention and International Fisheries Treaties

A recent case before the United Nations Law of the Sea Tribunal clearly demonstrates the problems incurred by the applicability of more than one regulation to a given case. Certain activities of Japan with regard to bluefin tuna in the Southern Pacific led to the question of whether the dispute settlement mechanism embodied in the Convention on the Regulation of Bluefin Tuna Fisheries in the Southern Pacific 1993 or that in the United Nations Law of the Sea Convention could be resorted to. The Tribunal decided by majority:

> "55. Considering that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea."

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[13] Article XI GATT.

[14] Cf. GATT, International Trade 90-91, Vol. I (1992), 45ss; in this study 17 environmental conventions containing trade provisions for reasons of environmental protection are listed; this list, i.a., includes the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

[15] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, GA RES 27/92 of 10 December 1982.

Without disputing the correctness of the finding of the Tribunal, the fact that this question came before the Tribunal already sufficiently proves that existing general international law does not contain a clear regulation of the priority of conflicting treaty obligations. Consequently, clear legal devices are needed to ensure harmonious regulations.

C. CAUSES

The fragmented nature of international law has been generated by a multitude of reasons creating different layers and subsystems of international law which could conflict one with another.

1. Lack of centralized organs

Fragmentation stems from the nature of international law as a law of coordination instead of subordination as well as from the lack of centralized institutions which would ensure homogeneity and conformity of legal regulations.

2. Specialization

According to Brownlie, fragmentation resulting from specialization poses the most dangerous threat to the coherence of international law;[16] he mentions in this respect human rights, the law of the sea, the law of development and environmental law. This development leads to "topic autonomy" with strange results (environmentalists neglecting State responsibility, human rights advocates being unaware of the rules concerning the treatment of aliens etc.). Accordingly, two principal threats to the unity of international law surface: the type of irregular specialization and political divisions on particular issues (in particular according to the north/south conflict).

3. Different structures of legal norms

This tendency is enhanced by the difference of the structures of legal norms. Existing international law faces at least three different legal structures: (1) classical international law consisting mainly of reciprocal norms of synallagmatic nature, i.e. norms creating bilateral reciprocal relations among States which leads to a splitting of the universal legal order in bilateral legal relations, (2) new developments of international law imposing duties on States owed to individuals such as norms protecting human rights, or (3) duties owed to the community of States as such participating in a given legal system.

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[16] Brownlie I., "Problems concerning the Unity of International Law", in *Le droit international à l'heure de sa codification.* Etudes en l'honneur de Roberto Ago, Volume I (Università di Genova, Istituto di Diritto Internazionale e della Navigazione della Facoltà di Giurisprudenza, Giuffrè Milano, ed. 1987), p. 156.

4. Parallel regulations

A further threat to the unity of international law stems from the parallel regulation on the universal or the regional level relating to the same matter. One example is the United Nations Convention on the non-navigational use of international watercourses of 1998[17] which is opposed to the European Convention in international watercourses of 1972 elaborated by the ECE. Both have to be combined with other conventions relating to specific watercourses such as the Rhine or the Danube. Solutions to the question which of them is applicable in a given case is mostly found by a reference to the provisions in these treaties attaching priority to the more specific conventions and to the *lex specialis* rule. Nevertheless, even these legal devices cannot always solve issues, in particular if non-riparian States are involved. Furthermore, the provisions regulating the precedence among these treaties very often escape a clear interpretation, so, for instance, a similar clause in the United Nations Convention on the Law of the Sea, namely article 132, which preserves agreements granting greater transit facilities than those accorded in the Convention requires first a weighing of the scope of transit facilities before a decision can be made whether a certain agreement remains in force.

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[17] Cf. e.g. the relevant articles of the United Nations Convention:

"Article 3

Watercourse agreements

1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.

2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.

3. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.

4. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or any part thereof or a particular project, programme or use except insofar as the agreement adversely affects, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse, without their express consent.

5. Where a watercourse State considers that adjustment and application of the provisions of the present Convention is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

5. Competitive regulations

Generally, this situation could also be engendered by the elaboration of different legal regimes in different international negotiation bodies, both addressing the same group of States. Suffice it to say that there is a competition of regulations concerning certain outer space activities (e.g. distribution of frequencies, resp. common use) between UNCOPUOS and the ITU (both already made attempts to harmonize their respective approach to this matter). Similar conflicts arise between regimes relating to trade matters and protection of the environment.

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6. Where some but not all watercourse States to a particular international watercourse are parties to an agreement, nothing in such agreement shall affect the rights or obligations under the present Convention of watercourse States that are not parties to such an agreement.

Article 4

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected."

The matter is even worse in the field of environment where different international bodies try to promote the elaboration of relevant regimes Examples which belong even to the same field of international law are for instance the Conventions on Desertification, on Climatic Changes and on the Ozone Layer

6 Enlargement of scope of international law

On a more general level, this fragmented nature of international law, according to P M Dupuy, is due to the enlargement of the material scope of international law, a multiplication of actors, and an effort to improve the efficiency of public international obligations, with the establishment of some conventional and sophisticated "follow-up" machinery, in particular in the fields of human rights, international economic law, international trade law, and international environmental law [18] Sergio Salinas Alcega and Carmen Tirado Robles, confirming this view, believe that this fragmentation is due to the expansion of the matters regulated by international law, the progressive institutionalization of the international society and the existence of parallel regulations [19]

The process of the expansion of international law goes, as Shaw notices, hand in hand with the upsurge in difficulties faced and the proliferation in the number of participants within the system[20] as well as the differences among them One cannot say that States generally apply international law [21] They apply certain rules to a given case in relation to a certain other subject or group of subjects of international law As early as 1928, the British Government criticized general arbitration treaties on the ground that, in the case of every country, "obligations which it may be willing to accept towards one State it may not be willing to accept towards another" [22]

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[18] P-M Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", *Journal of International Law and Politics*, 31 (1999), pp 791

[19] Sergio Salinas Alcega, Carmen Tirado Robles, Adaptabilidad Y Fragmentacion del Derecho Internacional La Crisis De La Sectorialización, Zaragoza, 1999, 161

[20] Shaw M N , International Law, 39

[21] Ford Christopher A , "Judicial Discretion in International Jurisprudence Article 38 (2) (c) and 'General Principles of Law', *Duke J Comp and Int'l Law*, vol 5, 1994, pp 35-86 (77)

[22] Ibid , p 196

This disintegrated nature of international law is still aggravated by the divergence of the legal and political cultures to which States adhere,[23] and the decreasing platform of universally shared values.

7. Different regimes of secondary rules

Developments in the past 30 years, however, have demonstrated that the mere existence of a multitude of primary norms does not automatically and necessarily improve international and regional cooperation. Indeed, the growing number of international primary norms has even resulted in increasing problems in regard to the implementation of the norms.

In order to avoid possible conflicts ensuing therefrom, the States chose to equip the primary norms with special secondary norms which would have precedence over the general secondary norms of international law.[24] These special secondary norms should ensure that the primary norms were respected, properly administered and violations of the norms adequately met.[25]

International Courts have also addressed the issue, focusing generally on the question of precedence of the secondary norms of such mechanisms or subsystems over the general secondary norms of international law.[26]

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[23] Cf. Franck Thomas M., "Legitimacy in the International System", in: *AJIL* vol. 82, 1988, pp. 705-759 (706), in whose view the perception of legitimacy will vary in degree from rule to rule and time to time.

[24] Brownlie, *State Responsibility* I (1983), 1; Jennings, "The Judicial Enforcement of International Obligations", *ZaöRV* 47 (1987), 16; White, "Legal Consequences of Wrongful Acts in International Economic Law", *NYIL* 16 (1985), 172; Zemanek, "The Unilateral Enforcement of International Obligations", *ZaöRV* 47 (1987). Regarding the relationship between general international law and subsystems and to further references see A. Marschik, Subsysteme im Völkerrecht - Ist die Europäische Union ein 'self-contained regime'? (1997). The question whether "precedence" can go so far as to exclude the application of general secondary norms is the core of the dispute regarding "self-contained regimes"; see Simma, "Self-Contained Regimes", 16 *NYIL* (1985).

[25] Sorensen, "Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organizations in the World Legal Order", *ICLQ* 32 (1983), 575.

[26] See especially the Teheran Hostages Case, ICJ-Reports 1980, paras. 83 and 85-87. Cf. also the Barcelona-Traction Case, ICJ-Reports 1970, paras. 36, 62 and 90; ELSI-Case, ICJ-Reports 1989, para. 50; Nicaragua-Case, ICJ-Reports 1986, paras. 267 and 274.

Whereas conflicts of primary norms could perhaps be attempted to be solved by recourse to the general secondary norms of *lex specialis* and *lex posterior*, this remedy is not always helpful in dealing with subsystems each subsystem always claims for itself to be the *lex specialis* and applies its own rules irrespective of another subsystem Practice shows that two subsystems with overlapping competencies can demand contradictory action In this case the State involved has to decide to comply with one subsystem and to violate the other This brings us full circle back to the original dilemma where States have to choose for themselves which norms they fulfil Since subsystems increasingly involve the individual, bestowing material and procedural rights onto him/her and, in some cases, even obligations, the problem concerns private parties as well

D EFFECT THREAT TO RELIABILITY AND CREDIBILITY OF INTERNATIONAL LAW

The disintegration of the legal order is conducive to jeopardizing the authority of international law Doubts could be raised as to whether international law will be able to achieve one of its primary objectives, dispute avoidance and the stabilization of international relations and, thus, achieve its genuine function of law The credibility, reliability and, consequently, authority of international law would be impaired The effect can be distinguished according to its effect for primary or secondary rules

1 Substantive law (primary rules)

As far as substantive law (in the sense of primary rules) is concerned, we now face different regimes relating to the same issue

In this regard legal regimes of a more general nature very often compete with regimes of a more special nature where the possible contradictions can only be overcome by the resort to rules such as *lex specialis* However, even where the more general regime contains special provisions defining the priority of rules (providing for instance priority of the general over the special provisions) it is often rather difficult to determine precisely which regulation should precede or be applied to a concrete case

Despite the merits regional and subregional regulations could have with regard to the solving of regional disputes and conflicts, it has also been noted that "the underlying diversity of nations and the tendency to regionalism even in respect of areas, such as human rights, where universal values would appear to be at stake, raises significant tensions for international law and may ever call in question its claim to 'universality'". Likewise was it even observed that "sectionalism and regionalism are powerful agents of international cooperation but not necessarily an unmitigated blessing for the development of international law".

As has been shown by concrete cases, the diversity of the applicable regulations necessitates complex arguments as to the regulation to be applied and could even give rise to more conflicts instead of resolving them. Despite these positive assessments of the multiplicity, a certain likelihood of a detrimental effect cannot be overlooked.

2. Secondary rules

As far as regulations on procedures to ensure the observance of international law are concerned, the fragmentation becomes even more evident. Major problems arise where a State could resort to different mechanisms of enforcement (ranging from dispute settlement to compliance mechanisms) relating to one and the same incident. Since most mechanisms, in particular the treaty bodies, are restricted only to their own substantive law as a legal basis for the legal evaluation of the dispute (except for instance the ICJ) States could then resort to the mechanism that corresponds best to their own individual interests. This possibility entails the risk of divergent solutions, a situation which certainly could undermine the authority and credibility of these instruments and of international law.

The diversity tends to maintain, if not strengthen, the disintegrated nature of international law and the international system as a whole. Each of these organs considers itself committed first of all to apply only its own system or subsystem of standards so that States would be induced to select that forum from which a favourable settlement can be expected ("forum shopping"[27])[28]. Likewise, the settlement reached by one of these organs would only have a certain relative effect as it would resolve a dispute only within one given system and not necessarily for the purpose of another or the universal system. This fact could therefore undermine any tendency towards a homogeneous international law and system and could engender an additional uncertainty of the standards to be applied to a given case.

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[27] This term is used in the field of International Private Law, cf. Baron Roger M., "Child Custody Jurisdiction", *S.D. L. REV.* vol. 38, 1993, pp. 479-498 (492); Borchers Patrick J., "Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform", *Wash. L. Rev.*, vol. 67, 1992, pp. 55-111 (96).

[28] States could benefit from this "forum shopping" insofar as they could select not only the forum most favourable to them but also the cheapest one.

This dispersed nature of judicial activity in a broader sense is still intensified by the lack of mutual information as it could be difficult for one institution to become acquainted with all the ramifications of the judicial reasoning of another body, in particular if the activity is not divulged, but kept secret.[29]

The then President of the ICJ referred to the effect of fragmentation in the field of secondary norms, namely in the system of peaceful settlement of disputes where a multitude of courts, tribunals and similar instances were not only beneficial, but could eventually also create a risk to the homogeneity of international law:

> "The entry of actors onto the international stage other than States, who also influence the processes of international law-making and administration, has among other factors fostered the creation of specialized international tribunals. This development makes international law more effective by endowing legal obligations with the means of their determination and enforcement. Concern that the proliferation of international tribunals might produce substantial conflict among them, and evisceration of the docket of the International Court of Justice, have not materialized, at any rate as yet."

Other possibilities of uncertainties concerning the applicable legal regulation still exacerbate this situation. Presently, international law undergoes a change insofar as emphasis is placed no longer on the elaboration of substantive law of a general nature, but on more special regimes and the law of enforcement (dispute avoidance and dispute settlement mechanisms).

E. URGENCY

The cases cited above warrant the need to deal with this matter.

Although the Vienna Convention of the Law of Treaties (VCLT) provides certain basic rules on this issue of priority and the situation of successive treaties relating to the same object, it might, however, be doubted whether they are satisfactory (e.g. the discussion about the *lex specialis*).

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[29] It is one of the common features of arbitration that proceedings are not published, but only the award.

As far as conflicting treaty norms are concerned, a solution could indeed be sought in the VCLT (cf. arts. 30, 40, 41 and 59), in particular in article 30.[30] However, this provision only reflects the general rule of *lex posterior derogat priori*, but not the principle of specialty (*lex specialis derogat generali* or *in toto iure genus per speciem derogatur*). Furthermore, it is generally recognized that the VCLT does not offer a solution to the problem of conflicting obligations owed by one State to different other subjects of international law. In such a case, the obligated State necessarily has to assume State responsibility. The only rules of a more general scope which clearly determine the priority of one regime are article 103 Charter and norms of an imperative nature (as far as they could be defined).

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[30] Article 30 reads:

> Application of successive treaties relating to the same subject matter
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> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

Another possibility to solve this problem could consist in explicit provisions of the treaties regulating the possible conflict with other treaties. This solution suffers by at least two deficiencies: first, it can become applicable only if the States involved are parties to all relevant treaties, second, the States are not always aware of the precise legal relationship among the treaties or remain silent on the priority of the treaties involved.

In light of the growing factual integration of world community on the one hand, and the proliferation of subsystems on the other, it is to be expected that the need to take measures to ensure the unity of the international legal order will increase.

It is therefore necessary first to become aware of this situation and tendency and to identify the different problems resulting therefrom as well as the lack of adequate legal solutions. Only on the basis of this survey of the situation and the problems, attempts can be made to find the necessary legal solution.

F. ENVISAGED SOLUTION

This particular problem does not lend itself to a solution through a regulation, at least not as yet.

President of the International Court of Justice, Schwebel, already proposed certain means to overcome the risk of fragmentation:

> "At the same time, in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law."

Other authors too, referred to the possibility of endowing the ICJ with some sort of monitoring authority in order to ensure consistency and harmony of the international legal order. However, one has to bear in mind that on the one hand, as yet, the ICJ does not possess this competence, on the other this means could only produce this effect *ex post*, i.e. after a conflict has arisen.

It could be the task of the ILC to raise the awareness of the States, which are and remain the main authors of international regulations, to this problem so that they can take it into account in the course of the elaboration of new regimes. The Commission could eventually elaborate certain guidelines addressing the issue of compatibility of different regimes, in this respect, the conclusions regarding reservations which the Commission has already adopted could serve as a useful model

At the outset, the work of the ILC in this respect could be threefold, either in an alternative or in a combined manner a report, a compilation of materials and proposals for operative work of the Commission

1. Report

It could draw up a report to single out and identify the different problems relating to this issue and to categorize them in order to raise the awareness of the States

In this respect, the Secretariat has already drawn the attention to former cases which could serve as precedents

> "6 So far with the exception of two cases, the outcome of the Commission's work on the topics that was studied have taken the form of draft articles for adoption as conventions, model rules, declarations, etc The two exceptions are the work of the Commission in connection with issues related to treaties In these two instances the Commission considered a particular topic in the form of a study accompanied by conclusions and included in the Commission's report to the General Assembly
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> 7 The first exception was in 1950 The General Assembly, by resolution 478 (v) invited the Commission, in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions in general, both from the point of view of codification and from that of the progressive development of international law, and to report to the Assembly at its sixth session, in 1951 The request was made by the General Assembly to provide guidance with respect to reservations for the Secretary General of the United Nations as the depository of multilateral treaties
>
> 8 In pursuance of this resolution, the Commission, in the course of its third session, gave priority to a study of the question of reservations to multilateral conventions The Commission had before it a "Report on Reservations to Multilateral Conventions" (A/CN 4/41) submitted by Mr Brierly, Special Rapporteur on the topic of the law of treaties, as well as memoranda presented by Messrs Amado (A/CN 4/L 9 and Corr 1) and Scelle (A/CN 4/L 14) The Commission's debate focused on

Brierly's report, paragraph by paragraph, in the plenary. It was finally adopted with several modifications and included in the Report of the Commission to the General Assembly [31] The report was also accompanied by six conclusions of the Commission on the topic.

9. The second exception was in 1962. By resolution 1766 (XVII) of 20 November 1962, the General Assembly requested the International Law Commission to study the question of participants of new States in certain general multilateral treaties, concluded under the auspices of the League of Nations, which by their terms authorized the Council of the League to invite additional States to become parties but to which States that had not been so invited by the League Council before dissolution of the League were unable to become parties to for want of our invitation. This problem had originally been brought to the attention of the Assembly by the International Law Commission.[32]

10. The Commission considered this report in two plenary meetings and adopted it with some modifications, including it also on its report to the General Assembly. As in the previous case, the Commission report to the General Assembly was accompanied by a number of conclusions."

The Secretariat therefore reaches the conclusion that:

> "[nothing] in the Statute or in the Commission's practice would prevent the Commission from initially preparing a study on legal questions that the Commission thinks would make contributions to the codification and progressive development of international law in the forms other than texts of draft articles. In two instances, the Commission had prepared studies, at the request of the General Assembly, accompanied by conclusions. The work in these two instances was practical and provided guidance to States and the Depositories of the Multilateral Treaties. In practice, the Commission, however, has always informed the General Assembly about its intention to embark on a topic."

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[31] *Yearbook* ... 1951, p. 125-131.

[32] *Yearbook* ... 1963, vol. II, p. 217-223

The report drawn up according to these precedents could take two forms:

(a) it could contain more concert statements of law and policy, closer to the model of the 1951 report on reservations to treaties, that can be discussed paragraph by paragraph by the Commission and amended if necessary,

(b) it could also take the form of a usual report to be discussed either in the Commission or in the context of a Working Group which could then be taken note of by the Commission itself.

Both versions could then be submitted to the General Assembly either as adopted by the Commission or as an annex to the Report of the Commission.

2. Compilation of materials

The Commission could try to illustrate this matter by compiling relevant materials in respect of specific matters and the insufficiency of the international legal order to cope with this problem. The result of the work would then consist likewise in a report which, however, does not contain any conclusions, but only draws the attention to the great diversity of the legal regulations governing such situations and, consequently, makes States more aware of the possible risks resulting from this problem.

3. Operative work of the Commission

With reference to article 17 of its Statute,[33] the Commission, perhaps on the basis of reports mentioned above, could also stimulate the States (and international organizations) to

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[33] Article 17 reads as follows:

> "1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General.
>
> 2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow in general a procedure on the following lines:
>
> (a) The Commission shall formulate a plan of work, and study such proposals or drafts, and compare them with any other proposals and drafts on the same subjects;
>
> (b) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

submit draft conventions first to the ILC before negotiations are concluded in order to identify the possible frictions with other already existing regulations and to avoid discrepancies among the relevant regulations, which States should take into consideration, for instance, during the process of negotiating a new legal framework. The ILC could be asked to devise a general "check-list" to assist States in preventing conflicts of norms, negative effects for individuals and overlapping competencies with regard to existing subsystems that could be affected by the new regime. In the course of reviewing on-going negotiations, the ILC could even issue "no-hazard"-certificates indicating that the creation of a specific new subsystem has no negative legal effects on existing regimes.

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(c) The Commission shall submit a report and its recommendations to the General Assembly. Before doing so, it may also, if it deems it desirable, make an interim report to the organ or agency which has submitted the proposal or draft;

(d) If the General Assembly should invite the Commission to proceed with its work in accordance with a suggested plan, the procedure outlined in article 16 above shall apply. The questionnaire referred to in paragraph (e) of that article may not, however, be necessary."